TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~324~~ 66

BERNHARD HUSSMAN, PLAINTIFF IN ERROR,

vs.

WILLIAM H. DURHAM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED FEBRUARY 5, 1894.

(15,500.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 14, 1896.

a Please before the supreme court of Iowa in a cause therein tried and determined between William H. Durham, appellee, and Bernhard Hussman, appellant.

Be it remembered that on the 5th day of September, 1892, the appellant filed in the supreme court of Iowa a printed abstract of the record, the same being in the words and figures following, to wit:

1 (This abstract was duly served upon the opposite party, as required by law.)

In Iowa Supreme Court.

WILLIAM H. DURHAM, Appellee,
vs.
BERNARD HUSSMANN, Appellant.

Appellant's Abstract of Record on Appeal.

From Carroll district court.

J. P. Connor, district judge.

Cole, McVey & Cheshire and Theodore G. Paine, attorneys for appellant.
J. M. McCaughn & C. A. Berry, attorneys for appellee.

In the District Court of Iowa in and for Carroll County.

WILLIAM H. DURHAM, Plaintiff,
vs.
BARNHARD HUSSMANN, Defendant. } Petition in Equity.

William H. Durham, plaintiff, for cause of action against the said Barnhard Hussmann, says:

Par. 1.

2 That on the 19th day of May, 1858, one Robert Craig obtained a certificate of the location for the south half of the northeast quarter and the northeast quarter of the northeast quarter of section 27, township 83, range 35 west, 5th P. M., Iowa, containing one hundred and twenty acres, to be issued to him from the Government of the United States of America, upon bounty land warrant number 27911, issued to one William Long, under the act of Congress of March 3, 1855, which certificate of location was placed on record in the office of the recorder of deeds of Carroll county, Iowa, where the said land is situated.

Par. 2.

That no patent issued upon said warrant, and on February 1, 1864, said warrant was cancelled and declared void as against the

United States by the Department of the Interior, at Washington, District of Columbia, on account of the forgery of the assignment purporting to be the assignment by said William Long; but the location made by the said Robert Craig was not cancelled nor set aside.

Par. 3.

That rule 41 adopted by the Department of the Interior, as contained in a circular issued July 20, 1875, and which has ever since been and is still in force, respecting locations and assignments of bounty land warrants, provides that "when a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon the parties in interest may procure the issuance of a patent by filing in the office for the district in which the land is situated an acceptable substitute for the said warrant; the substitution must be made in the name of the original locator and may consist of a warrant, cash or any kind of scrip legally applicable to the class of lands embraced in the entry."

Par. 4.

3 That on the 15th day of February, 1886, the Commissioner of the General Land Office, through the local office at Des Moines, Iowa, directed that the said office would allow C. A. and J. G. Berry, at any time within sixty days from that date, to pay into said office the sum of one hundred and fifty dollars as and for such substitution.

Par. 5.

That William H. Durham on the 19th day of March, 1886, by regular chain of conveyance from said Robert Craig, became the grantee of said land and thereafter on the 24th day of June, 1888, furnished the sum of one hundred and fifty dollars which was paid into the local office at Des Moines, Iowa, in substitution for the land warrant number 27911 in the name of F. M. Hunter trustee, which payment, under the direction of the Secretary of the Interior, was to be made by the trustee to be named by the parties claiming the right to enter said land, said Secretary then deciding that a patent to said land might issue in the name of said Craig and to be delivered to said trustee until the rights of the adverse claimants should be judicially determined in an action in a court of competent jurisdiction.

Par. 6.

That said land was placed upon the tax duplicates for the county of Carroll for the years 1860, 1861, 1862 and 1864, and the taxes remaining delinquent, said land was thereafter sold for the delinquent taxes, interests and costs, on the 5th day of October, 1868, and the same not being redeemed the treasurer of said county afterwards, to wit: on December 19th, 1871, executed a treasurer's deed to James Callanan, Jr., who then held the certificate of the tax sale, and thereafter the said James Callanan, Jr., conveyed said land by quitclaim deed to one Charles Bofink, and the said Charles Bofink

conveyed said land to Barnhard Hussman, defendant herein,
4 by quitclaim deed, dated March 6th, 1874, and the said Barnhard Hussmann, as the ultimate grantee of the said James Callanan, Jr., under said tax deed claims the right to enter said land and to substitute for the warrant number 27911 upon which the said Robert Craig entered said land and to receive a certificate of location and the patent therefor.

Par. 7.

That said Hussmann appealed from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, from the decision of said Commissioner sustaining the right of the plaintiff herein to substitution, and upon the hearing of such appeal the Secretary of the Interior sustained said order of said Commissioner but refused to issue and deliver a patent to said land to said plaintiff as the grantee of said Robert Craig and the party in interest under said uncancelled location of said warrant, for the reason that the award of the right of substitution to either of the parties applicant substantially involved the determination of whom the proper parties in interest were, and, in effect, includes judgment as to the status of the claim made under the said tax sale, which matter, said Secretary holds, is not within the scope of departmental action.

Par. 8.

That for the years 1860, 1861, 1862 and 1864, to wit: the years for which the taxes were levied in said Carroll county, upon which said tax sale was based, said land was not taxable and that no right, title or interest passed under and by virtue of said tax deed and that the same is void and a cloud upon the title to said land.

Whereas, and inasmuch as the plaintiff has no adequate
5 remedy at law, and as, under the decision of the Department of the Interior, no patent will issue to said land until the question as to the right to such patent between plaintiff and defendant has been settled and determined by a judgment of a court of competent jurisdiction, having jurisdiction of the parties and of the subject-matter, plaintiff prays that upon the final hearing of this cause the court will order, adjudge and determine, that the said land was not subject to taxation for the years 1860, 1861, 1862 and 1864, and that the pretended sale for taxes was and is void and of no force or effect, that the said tax deed executed by said treasurer in pursuance of such pretended sale is invalid and void and that the same be cancelled; that said plaintiff has the right to make substitution for said warrant by the payment of money, and for such other and further order in the premises as may be just and equitable.

C. A. & J. G. BERRY,
BARCROFT & BOWEN, AND
J. M. McCAUGHN,
Attorneys for Plaintiff.

STATE OF IOWA, } ss:
Polk County, }

I, C. A. Berry, being duly sworn, on oath say that I am one of the plaintiff's attorneys in the above-entitled cause. That I have personal knowledge of the facts acknowledged in the foregoing petition, and that the plaintiff is not present to verify this petition; that I have read said petition and know its contents and that the statements and allegations thereof are true as I verily believe.

C. A. BERRY.

Subscribed and sworn to before me by said affiant this 3d day of November, 1889.

J. G. BERRY,
Notary Public in and for Guthrie County, Iowa.

6 The court sustained defendant's motion for more specific statement, and to strike out paragraph eight of plaintiff's petition, and therefore plaintiff filed following amendment thereto.

In the District Court of Iowa in and for Carroll County.

W. H. DURHAM
vs.
BARNARD HUSSMANN. } Amendment to Petition.

And now comes the plaintiff, and in pursuance to the order of the court herein and for more specific statement and as a substitute for paragraph eight of said petition, stricken out by said order of the court, says: That the said Robert Craig, on the 19th day of May, A. D. 1868, entered in the land office at Council Bluffs, Iowa, the land described in said petition, and on the same day delivered to the receiver and register of said office land warrant No. 27911, issued to William Long, and which purported by the assignment thereon to be assigned to the said Robert Craig; said warrant was delivered by the said Robert Craig as the assignee thereof to the register and receiver of the land office at Council Bluffs, Iowa, on the said 19th day of May, A. D. 1858, for the purpose of procuring the issuance of a patent upon the said entry. And plaintiff alleges that said assignment purporting to be executed by the said William Long, was not in fact executed by him, but the same was false and forged, and thereupon, in proper proceedings had before the Department of the Interior of the United States of America, to wit, on the 1st day of February, 1864, said warrant was cancelled, as shown by endorsement thereon as follows:

"Pension Office, February 1, 1864.—This warrant has been this day canceled and declared void as against the United States on account of forgery in the assignment thereof. William Hel-
7 mick, for Commissioner." And said entry remains uncancelled. And plaintiff says that no other entry was made of

said land, nor any other application made for the entry thereof until after the 19th day of December, 1871.

And plaintiff says that said tax deed is a cloud upon the title of the said land, to wit: The tax deed so executed by the treasurer of said county as hereinbefore stated, and is for the reason aforesaid null and void.

C. A. & J. G. BERRY,
BARCROFT & BOWEN, AND
J. M. McCAUGHN,
Attorneys for Plaintiff.

In the District Court of the State of Iowa in and for Carroll County, January Term, 1891.

WILLIAM H. DURHAM, Plaintiff,
vs.
BERNARD HUSSMANN, Defendant. } Answer.

Comes now the defendant, Bernard Hussmann, by George W. Paine, his attorney, and for answer to the petition herein and the amendment thereto, avers as follows:

First. He denies each and every allegation in the said petition and amendment, except as is hereinafter stated and admitted.

Second. He admits the allegations contained in paragraph one, paragraph two, paragraph six and paragraph seven of said petition.

Third. And he further admits the allegations contained in the amendment to the petition herein, down to and including the words, "until after the 19th day of December, 1891," admitting hereby all the allegations of said amendment except the last sentence thereof, in reference to the tax deed being a cloud upon the title of the plaintiff and being void.

8 Fourth. This defendant for a defense to the action aforesaid, alleges that the lands described in the petition herein were liable to taxation for the years 1860, 1861, 1862 and 1864, and that on the 5th day of October, 1868, the said lands were duly sold by the treasurer of Carroll county, Iowa, for the taxes of the aforesaid years, the same having been delinquent, and that thereafter the said lands having not been redeemed from said sale, the treasurer of said county in due form of law, on the 19th day of December, 1871, made and executed in due form of law, a treasurer's tax deed, conveying said lands to James Callanan, Junior, which deed was thereafter duly recorded in the office of the recorder in and for Carroll county, Iowa, on the 19th day of December, 1871, in Book A of Tax Deeds, page 92, a copy of which deed is hereto attached and made a part of this answer and marked Exhibit "A."

Fifth. That after the making of the aforesaid tax deed this defendant acquired all the right and estate which passed to the said James Callanan, Junior, and that an abstract of his title to the said land is hereto attached and made part of this answer and marked Exhibit "B."

Sixth. That immediately after procuring his title to the southwest quarter of the northeast quarter and the northeast quarter of the northeast quarter of section 27, township 83 north, range 83 west, he entered upon the actual possession thereof, and has been in the open, adverse and notorious possession thereof and claiming the same as owner until the present time, and that more than five years have elapsed between the commencement of such possession and the beginning of this action. And also, that more than ten years have elapsed between the commencement of such possession and the commencement of this action.

Seventh. That immediately after said John Gartner pro-
9 cured the deed from H. E. Russell, for the southeast quarter of section 27, township 83 north, range 35 west, which is set out on said Exhibit "B," and the said John Gartner entered upon the actual occupancy of said last-named parcel of land and continued in the actual, open, notorious and adverse possession thereof and claiming the same as owner until in September, 1881, when the said John Gartner conveyed the same to this defendant, as shown on the said Exhibit "B," from and after which time this defendant being put in the possession thereof by said Gartner, entered into such possession thereof as owner, and has continued in the actual, open, notorious and adverse possession thereof until the present time.

Eighth. That more than five years have elapsed between the time the said Gartner entered into possession of the said last-named parcel of land and the commencement of this action, and more than ten years have elapsed between the commencement of this action and the time when said John Gartner so entered into possession of said last-named parcel of land.

Wherefore, this defendant prays judgment, that his title and possession to the said land may be confirmed and established as against the plaintiff herein and all persons claiming under or through him, that he may be decree- to have the right to make substitution for the said land under the rules of the Department of the Interior of the United States, and that he may have such other or further order of relief in the premises as shall be agreeable to equity.

GEO. W. PAINE,
Defendant's Attorney.

STATE OF IOWA, }
Carroll County, } *ss:*

10 I, Bernard Hussmann, being duly sworn, do depose and say, that the matters set forth in the foregoing answer are true as I verily believe.

B. HUSSMANN.

Subscribed and sworn to before me this 29th day of January, 1889.

GEO. W. PAINE,
Notary Public.

EXHIBIT "A."

Know all men by these presents:

That whereas, the following-described pieces of real property, situated in the county of Carroll and State of Iowa, viz:

The southeast quarter of the southwest quarter of section four (4), in township eighty-four (84) north, range thirty-five (35) west 5th P. M., Iowa.

The northeast quarter of the southwest quarter of section four (4), in township eighty-four (84) north, range thirty-five west 5th P. M., Iowa.

Were each subject to taxation for the years 1860 and 1864.

The northwest quarter of the northwest quarter of section twenty-six (26), in township eighty-four (84) north, range thirty-three (33) west 5th P. M., Iowa.

The northeast quarter of the southwest quarter of section twenty-six (26), in township eighty-two (82) north, range thirty-four (34) west 5th P. M., Iowa.

Were each subject to taxation for the years 1863 and 1864.

The northeast quarter of the northeast quarter of section twenty-seven (27), in township eighty-three (83) north, range thirty-five (35) west 5th P. M., Iowa.

The southeast quarter of the northeast quarter of section
11 twenty-seven (27), in township eighty-three (83) north, range thirty-five (35) west 5th P. M., Iowa.

The southeast quarter of the northeast quarter of section twenty-seven (27), in township eighty-three (83) north, range thirty-five (35) west 5th P. M., Iowa.

Were each subject to taxation for the years as above stated.

And whereas, the taxes assessed upon said respective pieces of real property for the year- aforesaid remained due and unpaid at the date of the sale hereinafter named.

And whereas, the treasurer of said county did, on the 5th day of October, A. D. 1868, by virtue of the authority in him vested by law, at the sale begun and publicaly held on the first Monday of October, A. D. 1868, expose to public sale, at the court-house in the county aforesaid, in substantial conformity with all of the requisitions of the statute in such case made and provided, the several pieces of real property above and hereinafter described separately, for the payment of taxes, interest and costs then due and remaining unpaid on each of said pieces of real property respectively.

And whereas, at the time and place aforesaid, M. Head, of the county of Greene, and State of Iowa, having offered to pay the sum of six (6) dollars and ninety (90) cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on the southeast quarter of the southwest quarter of section four (4), in township eighty-four (84), north of range thirty-five (35) west 5th P. M., Iowa, for the whole of the last above described tract of land, which was the least quantity bid for.

And whereas, at the time and place aforesaid, the said M. Head,

having agreed to pay the sum of six (6) dollars and ninety (90) cents, being the whole amount of taxes, interest and costs
12 then due and remaining unpaid on the northeast quarter of the southwest quarter of section four (4), in township eighty-four (84), north of range thirty-five (35) west 5th P. M., Iowa, for the whole of the last-described tract of land which was the least quantity bid for.

And whereas, at the time and place aforesaid, the said M. Head, having offered to pay the sum of eight (8) dollars and thirty (30) cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on the northwest quarter of the northwest quarter of section twenty-six, (26), in township eighty-four (84), north of range thirty (30) west 5th P. M., Iowa, for the whole of the last above described tract of land which was the least quantity bid for.

And whereas at the time and place aforesaid, the said M. Head, having offered to pay the sum of twelve (12) — and eighty-six (86) cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on the northeast quarter of the northwest quarter of section twenty-six (26), in township eighty-two (82), north of range thirty-four (34) west 5th P. M., Iowa, for the whole of the last above described tract of land, which was the least quantity bid for.

And whereas, at the time and place aforesaid, the said M. Head, having offered to pay the sum of thirteen (13) dollars and seven (7) cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on the northeast quarter of the northeast quarter of section twenty-seven (27), in township eighty-three (83), north of range thirty-five (35) west 5th P. M., Iowa, for the whole of the last above described tract of land, which was the least quantity bid for.

And whereas, at the time and place aforesaid, M. Head, having offered to pay the sum of thirteen (13) dollars and seven (7)
13 cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on the southeast quarter of the northeast quarter of section twenty-seven (27), in township eighty-three (83), north of range thirty-five (35) west 5th P. M., Iowa, for the whole of the last above described tract of land, which was the least quantity bid for.

And whereas, at the time and place aforesaid, the said M. Head, having offered to pay the sum of thirteen (13) dollars and seven (7) cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on the southwest quarter of the northeast quarter of section twenty-seven (27), township eighty-three (83), north of range thirty-five (35) west 5th P. M., Iowa, for the whole of the last above described tract of land, which was the least quantity bid for.

And payment of the said several sums of money having been by him made to the said treasurer, the said respective pieces of property were stricken off to him at the respective prices aforesaid. And whereas, the said M. Head, did, on the 4th day of October, A. D.

1869, duly assign the certificate of the sale of the property aforesaid and all his right, title and interest to said property to James Callanan, Junior, of the county of Polk, and State of Iowa.

And whereas, three years have elapsed since the date of said sale, and the said respective pieces of property have not been redeemed therefrom as provided for by law, nor either of them, nor any part thereof.

Now, therefore, I, Wm. Henry Price, treasurer of the county aforesaid, for and in consideration of the said several sums of money to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the
14 said James Callanan, Junior, his heirs and assigns the several pieces of real property which were stricken off to him at the said sale, as hereinbefore described, to have and to hold unto him, the said James Callanan, Junior, his heirs and assigns forever; however, subject to all the rights of redemption provided by law.

In witness whereof, I, Wm. Henry Price, treasurer as aforesaid, by virtue of the authority as aforesaid, have hereunto subscribed my name, on this 19th day of December, A. D. 1871.

WM. HENRY PRICE, *Treasurer.*

STATE OF IOWA, }
Carroll County. }

I hereby certify that before me, Chas. L. Bailey, a notary public in and for said county, personally appeared the above-named Wm. Henry Price, treasurer of said county, personally known to me to be the treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to, and who executed the above conveyance as treasurer of said county, and who acknowledged the execution of the same to be his voluntary act and deed as treasurer of said county, for the purposes therein expressed.

Given under my hand and seal, this 19th day of December, 1871.

CHAS. L. BAILEY,
Notary Public, Iowa.

EXHIBIT "B."

Abstract of Title.

Number 1.

The United States to Robert Craig.

Location certificate, dated May 19, 1858.

Number 2.

Treasurer of Carroll county to James Callanan, Jr.

15 Treasurer's tax deed, dated December 19, 1871; recorded December 19, 1871, in Book A, page 92. Conveys southwest

quarter of the northeast quarter and the east half of the northeast quarter, of section 27, township 83 north, range 35 west.

Number 3.

James Callanan and wife to Charles Bofink.

Deed, dated February 10, 1874; recorded March 4, 1875, Book I, page 559. Conveys same land as above deed.

Number 4.

C. Bofink to Bernard Hussman.

Deed, dated February 10, 1874; recorded March 11, 1874, in Book H, page 603. Conveys the southwest quarter of the northeast quarter and the northeast quarter of the northeast quarter of section 27, township 83 north, range 35 west; 80 acres.

Number 5.

Charles Bofink to H. E. Russell.

Deed, dated March 19, 1877; recorded March 22, 1877, in Book W, page 3. Conveys southeast quarter of the northeast quarter of section 27, township 83 north, range 35 west; 40 acres.

Number 6.

H. E. Russell to John Gartner.

Deed, dated March 13, 1877; recorded March 13, 1877, in Book M, page 2. Conveys same land as last-mentioned deed.

Number 7.

John Gartner and wife to Bernard Hussman.

Deed, dated September 16, 1881; recorded September 24, 1881, in Book R, page 619. Conveys same land as last-mentioned deed.

16 In the District Court of the State of Iowa in and for Carroll County.

WM. H. DURHAM, Plaintiff,
vs.
BERNARD HUSSMANN, Defendant. } Amendment to Answer of Defendant.

The defendant for amendment to his answer to the plaintiff's petition and amended petition heretofore filed herein on, to wit, January 29, 1889, states:

1st. The defendant hereby withdraws each and every statement contained in paragraph "third" of his answer. And in lieu of said paragraph "third" admits the allegations contained in the amendment to petition herein, down to and including the words "until after the 19th day of December, 1871," except the following state-

ment contained in said amendment to petition, to wit: "And plaintiff alleges that said assignment purporting to be executed by the said Wm. Long was not in fact, executed by him, but the same was false and forged and thereupon in proper proceedings had before the Department of the Interior of the United States of America, to wit: on the 1st day of February, 1864, said warrant was cancelled." The defendant denies each and every statement of said sentence.

The defendant admits and avers upon information and belief that Wm. Long, to whom the said land warrant was issued, assigned the same in blank, in the proper form, upon the back of said warrant, which assignment was made and properly witnessed and acknowledged, according to the rules of the Department of the Interior. That after the making of said assignment and the delivery thereof, the person receiving the same lost said warrant, and the same was found by some person to the defendant unknown; that said person sold said warrant to Robert Craig, who had no notice of said loss or finding, and who paid full value therefor, and delivered the same to him, and the said Robert Craig, in good faith,
17 filled his own name in the blank left in the assignment thereof, thereby making the assignment complete to Robert Craig, who then made entry of the land by the use of said warrant. The defendant further admits that the department made the order, as shown by the endorsement set out in said amendment to petition. The defendant denies the statements of the amendment to petition contained in the last paragraph thereof.

COLE, McVEY, CLARK, AND
GEO. W. PAINE,
Attorneys for Defendant.

In the District Court of Iowa in and for Carroll County.

WM. H. DURHAM, Plaintiff,
vs.
BARNARD HUSSMANN, Defendant. } Stipulation.

It is stipulated by the parties hereto that the following statements of facts may be used as evidence upon the trial of this cause, subject only to proper objection for incompetency or irrelevancy, excepting the objection that it is not the best evidence.

1. That from and after the 2d day of July, 1875, the Department of the Interior of the United States provided by rule covering the department with respect to locations and assignments of bounty land warrants that:

"When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issue of a patent by filing in the office of the district in which the land is situated an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any

kind of script legally applicable to the class of lands embraced in the entry."

2. That a copy of a letter hereto attached, dated October
18 14, 1885, directed to the register and receiver, Des Moines, Iowa, signed by S. M. Stockslager, Assistant General Commissioner, is a correct copy of the orginal letter of the Commissioner to said register and receiver, under that date, and the said copy may be read in evidence with the same effect as if the original thereof were produced and identified.

3. That the Commissioner of the General Land Office on the 31st day of July, 1885, in reply to the application for the issuance of a patent in the name of said Craig, said:

"I have to state that under a recent ruling of this office it is necessary that such substitution be made at the local office. I therefore herewith return the draft, and suggest that the one hundred and fifty dollars be paid to the receiver of the local office, now located at Des Moines, Iowa. At the same time you will accompany such payment with this letter, for instruction to said receiver, who will make out and forward to this office in a special letter, the usual receipt in such cases—the patent when issued will be in the name of Robert Craig, and when issued sent to your address."

C. H. & J. G. BERRY,
With whom BANCROFT & McCAUGHN,
Attorneys for Wm. H. Durham.
GEO. W. PAINE, *Defendant's Att'y.*

(*Copy of Letter Referred to in Paragraph* 2.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 14, 1885.

Register and receiver, Des Moines, Iowa.

GENTLEMEN: I have received the register's letter of the 5th ult. inclosing the register's receipt for one hundred and fifty dollars, paid by B. Hussmann as and for a substitution, for bounty land warrant No. 27611, for 120 acres, act of 1855, located at the late Council Bluffs, Iowa, land office, May 19, 1858, by Robert Craig, upon the east half of the northeast quarter and southwest
19 quarter of no-theast quarter section twenty-seven, township eighty-three north, range thirty-five west.

In reply I have to state that a letter was received at this office from C. A. & L. G. Berry, of Casey, Iowa, making inquiry in relation to the condition of the above location. They were informed in reply Nov. 12, 1883, that before a patent could be issued, a proper substitution for said warrant which had been canceled by the Commissioner of Pensions, must be made at this office, in the name of the locator, Robert Craig.

In a letter from them dated July 25, 1885, they inclosed to this office, as they had been advised, one hundred and fifty dollars for such substitution, but under a recent ruling of this office, that all

cash substitutions must be made at the local office, on the 31st of July last, said one hundred and fifty dollars was returned to them, with directions that the money must be paid to the receiver at your office, giving full directions how the same should be done.

In a letter from them dated the 29th ult. I am informed that they were told at the local office that such payment should not be made until the register shall issue a new certificate of sale or location, etc.

In another letter from them dated the 2nd instant it is stated that they filed certain papers with the register and receiver in relation to the matter, to be forwarded to this office, which papers have not yet been received.

You are therefore directed to at once forward to this office all letters or other papers filed in your office by said C. A. & J. G. Berry, or any other member of said firm, in relation to said case for examination.

The substitution as made by B. Hussmann has not yet been
20 confirmed, nor will it be, until a satisfactory explanation of the action taken by your office shall be made.

A copy of this letter will be sent to C. A. & J. G. Berry for their information.

Respectfully,

S. M. STOCKSLAGER,
Assistant Commissioner.

In the District Court of the State of Iowa in and for Carroll County.

WM. H. DURHAM, Plaintiff,
vs.
BERNARD HUSSMANN, Defendant. } Agreed Statement of Facts.

The following statement of facts is hereby agreed upon in the above-entitled action by and between the parties thereto, such agreement to be used in evidence by either party, subject only to proper objection for incompetency or irrelevancy excepting the objection that it is not the best evidence.

1st. All the matters set out in paragraphs one, two, three, four, five, six and seven of the plaintiff's petition in this action are admitted to be true.

2nd. That prior to the 15th day of February, 1886, the Commissioner of the General Land Office had directed the local land office at Des Moines to permit the party in interest in the land involved in this action to make substitution either in a new land warrant or in money for the warrant located on the said land by said Craig, and that action under such general direction, said local office on or about the 5th day of October, 1885, and prior to substitution made by William H. Durham, the defendant, substituted in money the sum of one hundred and fifty dollars and received a certificate therefor, which substitution was set aside by the Commissioner of the General Land Office on appeal, and on an appeal to the
21 Secretary of the Interior, the ruling set out in paragraph five of plaintiff's petition herein was made.

3d. That taxes were levied in the county of Carroll and State of Iowa upon the land described in the petition herein for the years 1860, 1861, 1862, and 1864, and that on the 5th day of October, 1868, the treasurer of said county, at the sale began and publicly held on the 1st Monday of October in the year 1868, exposed said land to public sale for said taxes at the court-house in the county aforesaid, and each of the several pieces of the said property were separately sold for the payment of said taxes, interest and costs then due and remaining unpaid on each of said pieces of land, and the same were struck off and sold to M. Head, who thereupon paid such taxes to said treasurer; and said Head did on the 4th of November, 1869, duly assign the certificate of the sale of said property and all his right, title and interest therein to James Callanan Jr. and afterwards, and on the 19th day of December, 1871, the treasurer of said Carroll county executed and delivered to the said James Callanan Jr. a deed for said land, a copy of which is attached to the defendant's answer in this action and marked Exhibit "A," which deed was afterwards and on the 19th day of December, 1871, duly recorded in the office of the recorder in and for said Carroll county in Book "A" of Tax Deeds, page 92.

4th. That after the making of the aforesaid tax deed, the defendant herein acquired all the right and estate which passed to the said James Callanan Jr. under the aforesaid deed and that Exhibit "B" attached to defendant's answer shows the several conveyances by which he acquired such title.

22 5th. That immediately after procuring such title to the southwest quarter of the northeast quarter and the northeast quarter of the northeast quarter of section twenty-seven, township eighty-three north, range thirty-five west, he entered upon the actual possession of the said land described in the said tax deed and has been in the open, adverse and notorious possession thereof, claiming the same as owner until the present time, and that more than five years have elapsed since the commencement of said possession and the beginning of this action, and also that more than ten years have elapsed between the commencement of such possession and the commencement of this action.

6th. That immediately after John Gartner procured the deed shown in said Exhibit "B" from H. E. Russell for the southeast quarter of the northeast quarter of the northeast quarter of section twenty-seven, township eighty-three north, range thirty-five west, the said John Gartner entered upon actual occupancy of the said last-named parcel of land and continued in the actual, open, notorious and adverse possession thereof, claiming the same as owner, until the month of September, 1881, when the said John Gartner conveyed the same to the defendant as shown on said Exhibit "B," and that from and after said month of September, 1881, the defendant was put in the possession thereof by the said Gartner, and the defendant entered into such possession claiming the same as owner and has continued in the actual, open, notorious and adverse possession thereof until the present time.

7th. That more than five years have elapsed between the time

said Gartner entered into such possession of said last-named parcel of land and the commencement of this action and more than ten years have elapsed between the commencement of this action
23 and the time when said John Gartner entered into the possession of said last-named parcel of land.

Dated December 5, 1889.

GEO. W. PAINE,
Defendant's Attorney.
C. A. BERRY,
J. R. BANCROFT, AND
JAS. M. McCAUGHN,
Attorneys for Plaintiff.

In the District Court of Iowa in and for Carroll County.

WM. H. DURHAM, Plaintiff,
vs.
BERNARD HUSSMANN, Defendant. } Stipulation.

It is stipulated that this case be submitted to the court upon the pleadings and proceedings therein and on the several agreed statements of facts heretofore signed by the parties be submitted to the court at the November term, 1890, and that the matter may be taken under advisement by Judge J. P. Conner and decided and entered of record in vacation. It is further stipulated that a copy of the patent issued for the land in controversy herein may be also submitted with the other evidence in the case, such copy to have the same force as evidence as the original.

Dated this 10th day of December, 1890.

GEO. W. PAINE,
Defendant's Attorney.
JAS. M. McCAUGHN,
C. A. BERRY, AND
J. R. BANCROFT,
Attorneys for Plaintiff.

(Receipt No. 21666.)

The United States of America to all to whom these presents shall come, Greeting:

Whereas, F. M. Hunter, trustee for Robert Craig, of Pottawattamie county, Iowa, has deposited in the General Land Office of
24 the United States a receipt of the receiver of the land office at Des Moines, Iowa, whereby it appears that full payment has been made by the said F. M. Hunter, trustee, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for sale of the public lands" and the acts supplemental thereto, for the east half of the northeast quarter and the southwest quarter of the northeast quarter of section twenty-seven, in township eighty-three north, of range thirty-five west of the fifth principal meridian of Iowa, containing one

hundred and twenty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract had been located by the said Robert Craig with warrant No. 27911 for 120 acres, act of 1855.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant unto the said Robert Craig and his heirs, the said tract above described; to have and to hold the same, together with all rights, privileges, immunities, and appurtenances of whatsoever nature, thereupon belonging unto the said Robert Craig and his heirs and assigns forever.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereto affixed.

Given under my hand at the city of Washington, the third day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

By the President:

BENJAMIN HARRISON,
By ELLEN MACFARLAND,
Assistant Secretary.

[SEAL.] J. M. TOWNSEND,
Recorder of the General Land Office.

Recorded, vol. 24, page 221.

UNITED STATES LAND OFFICE,
DES MOINES, IOWA, *April* 25, 1890.

This is to certify that the above is a true copy of patent issued in favor of Robert Craig, October 3, 1889. Said patent being now on file in this office.

D. M. FOX, *Register.*

Afterwards at the November term, 1890, this cause was submitted to the court under the three foregoing stipulations and on the pleadings herein and the patent therein referred to. No other evidence being offered by other parties on such submission and afterwards on the 31st of December, 1890, the following order and judgment was made and entered herein:

In the District Court of Iowa in and for Carroll County.

WM. H. DURHAM, Plaintiff,
vs.
BERNARD HUSSMANN, Defendant. } Order.

Now at this time this cause comes on for final decision and decree, the same having been tried and submitted, by the parties under an agreement, that the decision, decree and entry thereof

should be made in vacation as of the last day of the last term of said court. The said cause having been tried, submitted and decided upon the pleadings of the parties, the written stipulated statement of facts signed by the parties and the copy of patent referred to in pleadings and stipulations, and I hereby certify that
26 no other evidence was offered, used or considered in the case than that mentioned above. And the court being duly advised in the premises finds that the equities in the case are with the plaintiff and not the defendant, and it is ordered, adjudged and determined that the land in dispute, to wit: the south half of the northeast quarter and northeast quarter of the northeast quarter, section twenty-seven, township eighty-three, range thirty-five west, 5th P. M., Carroll county, Iowa, was not subject to taxation for the years 1860, 1861, 1862 and 1864 and that the sale for said taxes was and is void, and that the tax deed issued by the treasurer of Carroll county, Iowa, in pursuance of such sale is void and that the same be canceled, and that the plaintiff has the right to make substitution for said warrant by the payment of money and that the plaintiff's title to said land be quieted in him as against the defendant, and it is further adjudged that the defendant pay costs of this action taxed at $—. To all of which the defendant excepts.

Dated Dec. 31, 1890.

J. P. CONNER,
District Judge.

The foregoing is all the evidence given by the parties to this action and all of the proceedings had herein and all of said evidence was reduced to writing and certified by the judge before whom this cause was tried and made part of the record herein and afterwards and on the 15th day of June, 1891, the defendant duly perfected his appeal from the judgment entered herein to the supreme court of the State of Iowa.

COLE, McVEY & CHESHIRE AND
THEODORE G. PAINE,
Attorneys for Defendant.

27 And at the October term, 1892, said cause was submitted to said supreme court on the foregoing record and arguments of counsel, and on the 12th day of May, 1893, said court filed its decision or written opinion in the words and figures following, to wit:

28 In the Supreme Court of Iowa, October Term, 1892.

WILLIAM H. DURHAM
v.
BERNARD HUSSMAN, Appellant. } Filed May 12, 1893.

From Carrol district court—J. P. Connor, judge.

Action in equity to have canceled a tax deed purporting to convey land which the plaintiff claims to own. From a decree in favor of plaintiff the defendant appeals.

Theodore G. Paine and Cole, McVey & Cheshire, for appellant. Barcroft & McCaughan and C. A. Berry, for appellee.

29 ROBINSON, *C. J.:*

On the 19th day of May, 1858, Robert Craig located a bounty land warrant issued to one William Long upon the south half of the northeast quarter and the northeast quarter of the northeast quarter of section twenty-seven, in township eighty-three north, of range thirty-five west, in Carroll county. A certificate of location was issued and recorded in the office of the recorder of that county. No patent was issued upon the warrant, and on the 1st day of February, 1864, the warrant was canceled and declared void as against the United States by the Department of the Interior on account of the forgery of the assignment purporting to be that of William Long, but the location made by Craig was not canceled nor set aside.

On the 20th day of July, 1875, the Department of the Interior published rule 41, in regard to locations and assignments of bounty land warrants, which has since been in force, and which provides as follows:

30 "When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon the parties in interest may procure the issuance of a patent by filing in the office for the district in which the land is situated an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator and may consist of a warrant, cash, or any kind of scrip legally applicable to the class of lands embraced in the entry."

On the 19th day of March, 1886, the plaintiff, by a regular chain of conveyances from Craig, became the grantee of the interest Craig had acquired in the land in controversy.

The land had been assessed and taxed for the years 1860, 1861, 1862, and 1864, and on the 5th day of October, 1868, was sold for the taxes of those years, which had not been paid. In December, 1871, a treasurer's deed for the land was issued and recorded.

In February, 1874, defendant acquired the tax title to eighty acres of the land, and in September, 1891, he acquired that
31 title to the remainder. By virtue of the title thus acquired he claims the right to substitute for the canceled warrant

and to enter the land and receive a patent therefor and has attempted to make the substitution. The plaintiff claims the same right, and in June, 1888, furnished $150, which were paid to the land office in Des Moines under the direction of the Secretary of the Interior in the name of F. M. Hunter, trustee, as a substitute for the warrant.

The terms imposed by the Secretary provided for the issuing of a patent in the name of Craig to be held by the trustee until the rights of the adverse claimants should be judicially determined by a court of competent jurisdiction. A patent was issued in the name of Craig in October, 1889.

The plaintiff contends that the land was not taxable for the years 1860, 1861, 1862, and 1864, and that the tax deed was void.

The defendant insists that the location of the warrant by
32 Craig created a taxable interest in the land, and that the tax deed is valid. He also claims that he and his grantors had been in the actual and adverse possession of the land for more than ten years when this action was commenced; that such possession was continuous, open, and notorious, and that having been under a claim of right based upon the tax deed is sufficient to defeat the claim of plaintiff. The district court adjudged the tax title to be void, and that plaintiff had the right to substitute money for the warrant and quieted his title as against the defendant.

I. The second paragraph of the petition alleges that on the first day of February, 1864, the warrant which was located by Craig upon the land in question was canceled and declared void by the Department of the Interior, and that allegation is admitted to be true. The order canceling the warrant was indorsed upon it in words as follows:

33 "This warrant has been this day canceled and declared void as against the United States on account of forgery in the assignment thereof."

The appellant contends that the Department of the Interior possessed no power to cancel a land warrant in any event for the reason that the question whether the assignment was forged was judicial, but that if it had such power it could not be exercised without notice to the parties in interest, and it is claimed such notice is not shown in this case.

The power to cancel bounty land warrants which have been lost or destroyed was conferred upon the Secretary of the Interior by an act of Congress entitled "An act to authorize the — of land warrants in certain cases, and for other purposes," approved June 23, 1860. The act authorized the Secretary to issue new warrants in lieu of those canceled, and provides that when new warrants shall be issued the original warrants shall be deemed and held to be null and
34 void. The answer in this case alleges that the warrant was lost by Long, and the case is therefore brought within the purview of the act of Congress cited. It is true that the answer alleges that before the warrant was lost it had been assigned in blank and duly witnessed and acknowledged according to the rules of the Department of the Interior; that while in that condition it

was found by some person to defendant unknown, from whom Craig purchased it in good faith, without notice of the loss, and inserted his name in the blank. Whether these averments, if true, show that Craig acquired a good title to his warrant we need not determine, for the reason that they are not confessed and are not sustained by any proof. The facts admitted show that the warrant was lost to the rightful owner, and that an officer of the Government clothed with power to act ordered that it be canceled. The record before us shows nothing as to the proceedings had in
35 connection with the cancellation of the warrant, and in the absence of averment and proof to the contrary we must presume that they were regular.

The action of which appellant complains may have been taken after due notice to all parties interested in the warrant canceled, and a new warrant in lieu of it may have been issued to the rightful owner of the original and accepted by him in satisfaction of his claims. In this condition of the record we cannot say that the cancellation of the warrant was without authority, but, on the contrary, we must presume that it was valid.

It is not necessary, however, to rest our conclusion in this case upon the act of Congress specified. It was said in Cornelius *v.* Kessel, 128 U. S., 456, that "the power of supervision possessed by the Commissioner of the General Land Office over the register and receiver of the local land offices in the disposition of the pub-
36 lic lands undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry or the parties do not possess the qualifications required or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the Land Department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department."

The officers of the Land Department are not only required to determine whether lands are subject to entry and whether the applicants are qualified to make entries, but, in the case of land warrants, it is within their province to ascertain whether the person seeking to locate it — the person to whom it was issued, or one lawfully claiming through him, and, in case of an assignment, whether it is genuine. Therefore, when the Commissioner of the
37 General Land Office was advised that the assignment of the warrant in question was forged, he was authorized to suspend further proceedings under the entry, and upon a proper showing to vacate it so far as it depended upon the warrant. That he did more than to suspend proceedings under the entry and cancel the warrant is a matter of which no one interested in the warrant is complaining. Long is not a party to this cause, and the assignee of Craig is satisfied with the action of the Land Department, which terminated in the issuing of a patent to Hunter as trustee. That action must therefore be regarded as valid and final for the purposes of this case.

What we have said in regard to the powers of the Secretary of the Interior and Commissioner of the General Land Office is not intended to apply to a case where a patent has been issued before an attempt to cancel or suspend the entry is made. Moore *v.* Robbins, 96 U. S., 530.

38 II. Although the warrant located by Craig was canceled, the location or entry was not set aside, and it is insisted that it gave to him such an interest in the land that it became subject to taxation by the State. But the warrant located did not belong to him and the Government acquired nothing by its surrender, but was liable to the rightful owner for that warrant or a new one in lieu of it. Craig paid nothing for the entry, and it conferred upon him neither the legal nor the equitable title to the land. It is true that it was the practice of the Land Department at the time the warrant was located to afford a person who had located such a warrant, when such location was set aside because of some defect in the warrant, an opportunity to secure the land by purchase or by the location of another warrant where the location set aside was made in good faith. 1 Lester's L. L., 615, and rule 41 of 1875 made definite

39 the practice in such cases. But the right thus given was in the nature of a privilege which might be exercised at the option of the person for whose benefit it was given, but until exercised the title to the land, both legal and equitable, remained in the General Government. Lands of the General Government in this State are not taxable, nor can they be taxed for the year in which they are entered, located, or sold. Reynolds *v.* County of Plymouth, 55 Iowa, 92; Code, sec. 797 (7). It is true that lands derived from the General Government may be taxable before patents therefor have been issued. Railroad Co. *v.* Carrol- Co., 41 Iowa, 159; Land Co. *v.* Fitchpatrick, 52 *id.*, 244.

But such lands are taxable only when the equitable title has passed from the General Government and the person who has acquired it has done all which can be required of him and has a completed right to the patent. U. P. Railroad Co. *v.* McShane, 22 Wall., 444; K. P. R'y Co. *v.* Prescott, 16 *id.*, 603.

Neither the legal nor the equitable title to the land in con-

40 troversy passed from the General Government until the 24th day of June, 1888, when plaintiff paid to the receiver at Des Moines the money required as a substitute for the patent.

It follows that the land was not taxable before the year 1889, and that no title was conveyed by the tax deeds. It is said that the patent when issued related back to the original location, and Wheeler *v.* Merriman, 30 Minn., 372, is relied upon as supporting that claim. It was said in that case that "it is well settled that land purchased of the United States and paid for, though not patented, is subject to taxation."

That may be conceded, subject to such limitations as are imposed by the State in which the land is situated; but when, in law, is payment in such a case as this made? Certainly not when a warrant which cannot be received legally is tendered in payment. For some

purposes a patent when issued operates to vest the title in
41 the patentee by relation back to the date of the certificate of location or entry, as to make of no effect an intervening duplicate certificate of entry. Heirs of Klein *v.* Argenbright, 26 Iowa, 494. In Gibson *v.* Choteau, 13 Wall., 92, it was said that "the doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim or right to the title."

But there is no privity between defendant and Craig. A tax title is not derivative, but is new and independent of former titles, and to hold that by reason of the payment of June, 1888, the equitable title to the land passed from the United States thirty years before that time would be not only unauthorized, but contrary to the doctrine of relation as stated. Our conclusion is sustained by the cases of Reynolds *v.* County of Plymouth, 55 Iowa, 93, and
42 Calden *v.* Keegan, 30 Wis., 126.

The statute of limitations does not run against the United States. Since Craig acquired no taxable interest in the land by his location, the tax deed conveyed no title, and defendant has acquired no right by the possession of the land held by himself and his grantors. The General Land Office treated the entry of Craig as sufficient to enable him and his assignee to perfect the entry, and thus acquire title to the land. The plaintiff has acquired all rights which the original entry conferred upon Craig, and by his payment of money in lieu of the warrant and the issuing of the patent has become entitled to the land.

The decree of the district court is affirmed.

43 And on the same day said supreme court rendered a final judgment in said cause, the same being in the words and figures following, to wit:

"WILLIAM H. DURHAM
vs.
BERNHARD HUSSMANN, Appellant. } Appeal from Carroll Dist. Court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $12.75, and that execution issue therefor."

44 On the 10th day of June, 1893, a petition for rehearing was filed in said supreme court, and the same, having been fully considered, was overruled on the 14th day of Oct., 1893.

On the 25th day of November, 1893, there were filed in the office of the clerk of said court a petition for writ of error, bond, writ of

error, and citation, and on the 28th day of November, 1893, an assignment of errors, and the same are hereto attached in original form as a part of this transcript, while true and correct copies thereof are retained in the office of said clerk.

44½ Filed Nov. 25, 1893. G. B. Pray, clerk of supreme court.

Supreme Court of the State of Iowa.

WILLIAM H. DURHAM, Plaintiff,
vs.
BERNHARD HUSSMANN, Defendant.

To the hon. chief justice of the supreme court of Iowa:

The petition of Bernhard Hussmann, defendant, above named, respectfully showeth that in the judgment and decision of the above-entitled cause by the supreme court of Iowa there was drawn in question the construction of certain statutes of the United States and the said judgment and decision were against the title, right, and privilege claimed by petitioner under the same.

Your petitioner further prays your honor to examine the record in said suit herewith presented and therefor allow a writ of error in said cause from the Supreme Court of the United States to the supreme court of Iowa, pursuant to the acts of Congress of the United States in such cases made and provided.

C. C. COLE,
Att'y for Defendant.

The writ of error as within prayed is allowed this 18th day of October, 1893.

G. S. ROBINSON,
Chief Justice Supreme Court of Iowa.

45 Filed Nov. 25, 1893. G. B. Pray, clerk of supreme court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between William H. Durham, plaintiff, and Bernhard Hussman, defendant, wherein was drawn in question certain statutes of the United States, and the said judgment and decision were against the title, right, or privilege claimed by said defendant under the same, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with

all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 2nd day of November, A. D. 1893.

Seal U. S. Circuit Court, Southern District Iowa.

EDWARD R. MASON,
Clerk U. S. C. C., Southern District of Iowa.

Allowed:
G. S. ROBINSON,
Chief Justice.

46 Filed Nov. 25, 1893. G. B. Pray, clerk of supreme court.

UNITED STATES OF AMERICA:

To William H. Durham, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from date, pursuant to a writ of error filed in the clerk's office of the supreme court of Iowa, wherein Bernhard Hussman is plaintiff in error and William H. Durham is defendant in error, to show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should — be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of United States, this 2nd day of November, A. D. 1893.

G. S. ROBINSON,
Chief Justice of the Supreme Court of Iowa.

Service accepted this 25th day of November, 1893.
BARCROFT & McCAUGHAN,
Att'ys for Def't in Error.

47 Filed Nov. 25, 1893. G. B. Pray, clerk of supreme court.

Know all men by these presents that we, Bernhard Hussmann, as principal, and Louis Schenking, Banard Espenhoever, and Jos. Wierling, as sureties, are held and firmly bound unto W. H. Durham in the full and just sum of fifteen hundred dollars, to be paid to said W. H. Durham, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of November, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a session of the supreme court of the State of Iowa, in a suit depending in said court between said W. H. Durham as plaintiff and said Bernhard Hussman as defendant, a final judgment or decree was rendered against the said Bernhard Hussman, and the said Bernhard Hussman having obtained a writ of error in the aforesaid suit to the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the said Bernhard Hussman shall prosecute said writ of error to effect and answer all costs and damages if he fail to make his plea good, then the above obligation to be void; else to remain in
48 full force and virtue.

B. HUSSMANN. [SEAL.]
LOUIS SCHENKING. [SEAL.]
BANARD ESPENHOEVER. [SEAL.]
JOSEPH WIERLING. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

Subscribed before me this 18th day of Nov., 1893, by B. Hussmann, Louis Schenking, B. Espenhoever, and Jos. Wierling.

[Notarial Seal of Adam M. Steffes, Iowa.]

ADAM M. STEFFES,
Notary Public.

49 STATE OF IOWA, } ss:
Carroll County, }

We, the undersigned, first being duly sworn, depose and say and each for himself deposes and says that he is one of the sureties whose name is subscribed to the annexed and foregoing bond; that he is a resident of the State of Iowa; that he is worth double the sum secured by said bond beyond the amount of his debts and liabilities, and that he has property liable to execution in said State equal to the sum secured in said bond.

LOUIS SCHENKING.
BERNARD ESPENHOEVER.
JOSEPH WIERLING.

Subscribed and sworn to before me by Louis Schenking, Bernard Espenhoever, & Jos. Wierling this 18 day of November, A. D. 1893.

[Notarial Seal of Adam M. Steffes, Iowa.]

ADAM M. STEFFES,
Notary Public.

STATE OF IOWA, } ss:
Carroll County, }

I, J. W. Kennebeck, clerk of the district court within and for said county, do hereby certify that I consider the sureties whose names are subscribed to the foregoing bond are good and sufficient for the sum therein named, and I, as said clerk, would accept and approve the same if presented to me in this county for the purpose therein set forth.

Witness my hand and seal of said court this 18th day November, A. D. 1893.

[Seal of the District Court, Carroll County, Iowa.]

J. W. KENNEBECK,
Clerk of the District Court.

The within bond is hereby approved this 21st day of November, A. D. 1893.

G. S. ROBINSON,
Chief Justice of the Supreme Court of Iowa.

50 In the Supreme Court of the United States.

BERNARD HUSSMAN, Appellant,
vs.
C. DUNHAM, Appellee. } Assignment of Errors.

And now, on this 2nd day of November, 1893, being of the October term, 1893, comes the said Bernard Hussman, by his attorney-and counsellor-, C. C. Cole and George W. Paine, and says that in the recorded proceedings in the above-entitled matter there is manifest error in this, to wit:

1. The court erred in so construing the acts of Congress authorizing the entry of public lands with bounty land warrants as to hold that by the entry of such bounty land warrants in this case and the is-uance to Robert Craig, so entering the same, of the certificate of entry did not vest in the said Craig such interest and title to the real property so entered as to make the same subject to taxation by the State.

2. The court erred in so construing the acts of Congress authorizing the entry of public lands by bounty land warrants as to hold that the entry of land in this case by bounty land warrants No. 27911, issued to William Long, said entry being made on May 19th, 1858, which was duly recorded in Carroll county in 1858, did not vest in locator of said warrant and the grantee in said certificate, Robert Craig, such an interest in the land as to render the same subject to taxation for the years 1860 and 1861 and 1862, no adverse claim to or effort to interfere with said location having
51 been made by any one until after January 1st, 1864.

3. The court erred in so construing an act of Congress entitled "An act to authorize the reissue of land warrants in certain

cases, and for other purposes," approved June 23rd, 1860, as to hold that the Commissioner of the Land Department had authority to cancel the entry made by Robert Craig without any notice to him of any proceeding anterior to the entry of the order of cancellation.

4. The court erred in so construing said act approved June 23rd, 1860, as to hold that the Commissioner of the Land Office had power under said act to cancel the warrant or entry without due notice being given & being expressly shown to have been given the person interested in such land before making such entry.

5. The court erred in so construing said act of June 23rd, 1860, and in not construing said act as conferring no power upon the Department of the Interior to determine judicial questions.

6. The court erred in not construing the acts of Congress in relation to the entry of public lands by bounty land warrants as that thereunder by the location of the warrant and the issuance of the certificate to the locator thereof such locator acquired an interest in the land subject to taxation.

7. The court erred in not so construing the acts of Congress in relation to entry of public lands by bounty land warrants as to hold that by the entry of such land under a bounty land warrant
51½ and the issuing of the certificate therefor conferred upon the holder of said certificate such an interest in the lands as that the same were taxable up to and prior to any claim made adverse to such entry.

8. The court erred in so construing the acts of Congress authorizing the location of bounty land war-ants upon the public lands as not to hold that by such entry and the issuance of a certificate *to* locator thereof should acquire a right subject to taxation, but subordinate to the paramount authority or right of the Government to assert its title in case the same was not perfected in such locator and certificate-holder.

9. The court erred in so construing the acts of Congress in relation to the entry of public lands by bounty land warrants as that the right of the locator of said warrant, against whom the statute of limitations had begun to run, that said statute would cease to run because of the failure of said Craig to complete his purchase.

Wherefore the said Bernard Hussman prays that the judgement and decree of the said supreme court of the State of Iowa be reversed, and that the title and right of the said Bernard Hussman in and to the S. ½ of the N. E. ¼ and the N. E. ¼ of the N. E. ¼ of section 27, in township 83 north, of range 35 W., in Carroll county, be settled and quieted in the said Bernard Hussman.

C. C. COLE,
Att'y for Appellant.
With whom is GEORGE W. PAINE.

52 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record, decision, and final judgment in the case of Bernhard Hussman, pl'f

in error, *vs.* William H. Durham, def't in error, as full, true, and complete as the same remain on file and of record in my office.

I further certify that the original petition for writ of error, the writ, bond, citation, and assignment of errors, are hereto attached and made a part of the return to said writ, and I have retained in my office true and correct copies of said papers, and this return is made in obedience to said writ of error.

Seal of the Supreme Court of Iowa.

In testimony whereof witness my signature and official seal this 28th day of November, 1893.

G. B. PRAY,
Clerk Supreme Court Iowa.

Endorsed on cover: Case No. 15,500. Iowa supreme court. Term No., 324. Bernhard Hussman, plaintiff in error, *vs.* William H. Durham. Filed February 5, 1894.

165-144

165-144

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1896.

BERNHARD HUSSMAN,
Plaintiff in Error,
vs.
WILLIAM H. DURHAM.
Defendant in Error.

No. ~~774~~ 66.
In error to the Supreme Court of the United States from the state of Iowa.

MOTION TO DISMISS WRIT OF ERROR AND FURTHER PROCEEDINGS HEREIN THEREUNDER.

And now comes the said William H. Durham, defendant in error, and moves the court to dismiss the writ of error herein and all further proceedings under it, and for cause of said motion shows:

First. That in the judgment and decision of the above entitled cause by the Supreme Court of Iowa there was not drawn in question the construction of the constitution, or any statute or law of the United States.

Second. That the record certified in this court shows that the judgment and decision of the said Supreme Court of Iowa in said cause was based and determined exclusively upon the statutes and laws of said State of Iowa.

BRIEF IN SUPPORT OF MOTION.

The facts material to the consideration of the motion may be briefly stated as follows:

First. Robert Craig, on the 19th day of May, 1858, obtained a certificate of location for the land in controversy from the proper local land office of the United States on bounty warrant No. 27911 issued to William Long, which had endorsed thereon what purported to be an assignment thereof by said Long to said Craig.

Second. The officers of the land office refused to accept said warrant in payment for said land giving as a reason for such refusal that said assignment was not genuine; and on the first day of February, 1864, ordered its cancellation and endorsed said order on the warrant.

Third. Thereafter the land was placed on the tax list of the proper county and taxes levied thereon for the years 1860, 1861, 1862 and 1864, which taxes not having been paid, the land was sold for their payment on the 5th day of August, 1868; and on the 19th day of December, 1871, a tax deed therefor was executed to the purchaser. Plaintiff in error claiming title through a quit claim deed from the pur-

chaser dated February 10, 1874, took and has ever since been in possession.

Fourth. On the 15th day of October, 1886, plaintiff in error, claiming to be the owner under said tax sale, applied to the local land office to make substitution of money for the cancelled warrant and obtain a patent for the land located on it, paid the necessary amount to the receiver and received from him a receipt therefor. On an appeal the commissioner of the land office set aside this substitution.

Fifth. On the 24th day of June, 1888, F. M. Hunter, as trustee of said Robert Craig, paid at the proper local office, the amount necessary to make substitution of the cancelled warrant and obtained a receipt therefor and a patent executed by the President of the United States to said Robert Craig and his heirs; said patent was delivered to said trustee to be held by him "until the rights of the adverse claimants should be judicially determined in a court of competent jurisdiction."

To determine these rights this suit was brought.

The plaintiff in the action below (defendant in error) relied upon the substitution of money made in the name of the original locator and of the patent issued to the said Robert Craig and his heirs, under rule 41 of the land department (see record, page 2, paragraphs 3, 4 and 5 of the petition) and admissions in answer (record, p. 3), amendment to answer (record, p. 10), stipulations (record, p. 11), agreed statement of facts (record, p. 13).

Defendant in the action below (plaintiff in error) relied on the title through the sale of the land for taxes and the bar of the statute of limitations.

If the land was not taxable for the years 1860, 1861, 1862 and 1864, or either of them, the sale of the land for the alleged delinquent taxes of those years is void and conferred no right whatever in the purchaser or in plaintiff in error as claimant through a quit claim deed executed by the purchaser.

If the legal or equitable title of the United States had not been divested the statute of limitations did not begin to run by reason of the claim made and possession taken under it.

II.

Whether upon the agreed statement of facts the lands were subject to taxation under the statutes of Iowa is a question for the state courts and not for this court to decide. It is a state and not a federal question.

Whether the land department had authority to determine that what purported to be an assignment of the warrant by William Long was a forgery; whether if authority was given any notice was necessary to a proper exercise of the authority, and if so, whether such notice was given; what, if any, effect the order cancelling the warrant and its indorsement had upon the locator or others; how, or to what extent any person or any interest in the property was effected by the refusal of the department to receive the warrant and execute a deed for the land to the locator, are wholly immaterial questions and do not draw the construction of any statute of the United States in question in order to the determination of this cause.

It may be conceded for the purposes of this argument, that the land department had no authority to conclude the locator by its finding that the assignment under which he held the warrant was a forgery; that he was not concluded by the

order of cancellation made and endorsed thereon, and that he might, in a proper manner, have asserted the genuineness of the assignment and compelled the acceptance of the warrant and the issuance of a patent for the land located upon it.

He was not compelled to assert a claim to the land. If he did not, and the assignment was genuine he held, and owned it ; and the United States held and owned the land.

If the assignment was a forgery the warrant still belonged to William Long. In any event it was outstanding and the rightful holder could make a valid location with it. Why the locator did not insist upon the validity of the assignment of the warrant to him; have the ruling of the department set aside or compel thee xecution of a deed upon surrender of the warrant, is also immaterial.

He might have acquiesced because convinced of the correctness of the ruling of the department, or because he did not want to make a contest. His acquiescence was a waiver of all errors, if any, an abandonment of a claim to pay for the land with the warrant.

The transaction left the title, legal and equitable, in the government, with no obligation on the part of the locator to take the land, and with no right to it or to obtain it except upon the terms and conditions which applied to all other applicants as to payment for it.

It is held by repeated decisions of the supreme court of Iowa that while under some circumstances lands in which the legal title is in the United States can be taxed under the statutes of Iowa, it can be only where the equitable title is vested in another, and nothing remains to be done to entitle the other to an immediate conveyance. It is not taxable if it has not been paid for.

There is no basis in the admitted facts, in the statutes of Iowa, or in the decision of its supreme court, for the claim that the land in controversy became subject to taxation prior to the time that the locator, availing himself of the rule of the department, made substitution for the warrant it had refused to take for the land. This was not done until long after the taxes had been levied and the land sold for their payment.

And however irregular or erroneous the previous proceedings may have been, and although the locator might have compelled the department to accept the warrant, yet as he did not, and as the warrant was never surrendered or delivered to thegovernment, it was not divested of and the locator did not acquire any title or interest, legal or equitable, to the land.

A proceeding contesting the authority of the land department to decide upon the validity of a bounty land warrant, or to set aside an order cancelling it, or to assert the right of a locator to a deed for the land upon surrender of the warrant, would draw in question the construction of the statutes of the United States conferring authority and regulating the manner of its exercise.

This is not an action to review or reverse, to confirm or set aside, the action of the department, but is based on the situation, as the action of the land department and the locator, made it and left it; the result of their joint action, or the action of one with the acquiescence of the other, which neither has sought in any manner to reverse or disturb.

While the plaintiff in error in his amended answer denies the alleged forgery of the assignment of the warrant, and the allegation that it was set aside and cancelled by proper proceedings, he admits that the order of cancellation was made

and alleges that William Long, to whom the warrant issued, made an endorsement of the warrant in proper form but in blank as to assignee, and after thus endorsing it lost it. Some person found it and without authority sold it to Craig, who filled the blank for the name of the assignee with his own.

These allegations of the answer are, without further pleading, by force of the Iowa statute regulating pleading, regarded as denied. And no evidence was offered to sustain them.

Treating them however as true, they would not require the department to receive the warrant in payment for the land, and there was no error in its refusal. But if it is admitted that it was the duty of the officers of the department to receive the warrant, and make the deed, notwithstanding the facts admitted of record, the fact remains that they did not do it, but refused to, the government did not get the warrant, and did not part with the land. The land did not become subject to taxation, whether the action of the land department was right or wrong.

If wrong it could have been corrected, but until it was and the land warrant had been received, the land would not become taxable, and no construction of any law of congress relating to the matters assigned as error would change or affect the decision.

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Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 66.

BERNHARD HUSSMAN, Plaintiff in Error,

vs.

WILLIAM H. DURHAM.

IN ERROR TO THE SUPREME COURT OF IOWA.

ARGUMENT FOR PLAINTIFF IN ERROR,

ALSO,

RESISTANCE TO DEFENDANT'S MOTION TO DISMISS.

C. C. Cole, of Des Moines, Iowa,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 64.

BERNHARD HUSSMAN, Plaintiff in Error,

vs.

WILLIAM H. DURHAM.

IN ERROR TO THE SUPREME COURT OF IOWA.

ARGUMENT FOR PLAINTIFF IN ERROR,

ALSO,

RESISTANCE TO DEFENDANT'S MOTION TO DISMISS.

STATEMENT OF CASE.

On May 19th, 1858, Robert Craig, assignee to William Long of bounty land warrant No. 27911, located the same upon and received from the proper land officer of the United States a certificate of location of the south half of the northeast quarter and the northeast quarter of the northeast quarter of sec. 27, township 83, range 35 west, 5th P. M. Iowa, containing one hundred and twenty acres of land.

The land so located was duly entered for taxation, and taxed by the County of Carroll for the years 1860, 1861, 1862 and 1864; which taxes were not paid. Afterwards and on October 5th, 1868, said land was sold for the taxes so delinquent, and not being redeemed, the same was conveyed December 19th, 1871, by the Treasurers deed to James Callanan, Jr., assignee of the certificate of purchase thereof.

The plaintiff in error is owner of the title thus acquired.

On February 1st, 1864, without any notice to anyone or any hearing in connection therewith, the Pension office made this entry, to-wit: "Pension Office, February 1, 1864. This warrant has been this day canceled and declared void as against the United States on account of forgery in the assignment thereof. William Helmick, for Commissioner." That entry remains uncanceled. It was pleaded by the plaintiff below, that said entry was made "in proper proceedings had before the Department of the Interior of the United States of America;" but there is no proof nor any pretense of any evidence tending to show such proceedings; and the averments in that respect are expressly denied by the answer of the defendant below. (Rec. 11.)

The defendant below (the plaintiff in error here) averred that he procured the title conveyed by the tax deed and entered into actual, open and adverse possession as owner and had so held the same, by himself and grantors, for more than five years; and also that his adverse possession had continued more than ten years before the bringing of this action, which was commenced September 5th, 1892.

By a rule made by the Department of the Interior of the United States on July 2nd, 1875, with respect to locations and assignments of bounty land warrants it was provided that "When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issue of a patent by filing in the office of the district in which the land is situated an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any other kind of script legally applicable to the class of lands embraced in the entry."

The plaintiff below claiming to be grantee, on March 19, 1886, by regular chain of conveyance from Robert Craig, made application in June, 1888, to the department for leave to substitute the money for the warrant and to have a patent issued to him. The defendant below being advised thereof, resisted the claim and demanded the patent to be issued to him and offered to substitute money for the bounty land warrant. This contest resulted in an order by the Department for the issuance of a patent in trust to F. M.

Hunter, Trustee, to hold the title subject to the decision of the proper court, as to the party who was entitled thereto. When the rights are thus settled in court, the trustee is to convey the land to the successful party.

The Supreme Court of Iowa, on appeal from the judgment of a District Court of that state, decided the right to the land to be in the plaintiff below; and this writ of error is prosecuted from that decision and judgment. Defendant in error has filed herein his

MOTION TO DISMISS THE WRIT OF ERROR.

The facts are as set forth in the foregoing statement. The defendant here, in his brief in support of his motion, has stated five claimed facts. The first fact stated by counsel for the defendant in his brief in support of the motion is correct. Each of the other claimed facts, numbered 2nd, 3rd, 4th, and 5th are denied. It is stated in the 2nd claimed fact, that "the officers of the land office refused to accept said warrant in payment for said land." The truth is, the land officers did accept the warrant and issued the certificate of entry to Robert Craig. In the 3rd claimed fact it is stated that after the cancellation of the warrant "the land was placed on the tax list of the proper county." While the fact is, the land was placed on the tax list in 1860. Like inaccuracies occur in each the 4th and 5th statement of claimed facts.

In respect to the claim of the plaintiff in error in support of his right to prosecute this writ of error, the following positions and facts are briefly stated:

First. The plaintiff in error claims the land under the Act of Congress authorizing the issue of bounty land warrants, approved September 28, 1850; and the Act of Congress authorizing the transfer by assignment of bounty land warrants, approved March 3rd, 1855.

Second. The plaintiff in error claims the land in controversy under a certificate of entry and location thereof, pursuant to Act of Congress authorizing such entry and location, approved ——

Third. The plaintiff in error claims the land under the Act of Congress and the regulations of the Department of the Interior requiring notice to the persons

who have acquired rights by the entry and locations of lands, before such rights can be determined or defeated or even disturbed. That such notice is also required by the elementary and fundamental principles of the common law, recognized by the constitution of the United States.

This is a controversy between Robert Craig (or his privy) a holder and locator of a bounty land warrant issued under an Act of Congress, and William Long (or his privy, and the plaintiff below, in setting up the order and claiming under it, makes himself privy,) who claims that by proceedings in the United States Pension Office under an Act of Congress, the right or title acquired by Robert Craig was set aside and canceled. If it shall be found that Robert Craig by the entry of the bounty land warrant upon the land in controversy, acquired a right in or to the land, then he acquired such right under the Act of Congress. Whether he did acquire such right or not is certainly a federal question.

On the other hand, William Long (or his privy) claims that no right in or to the land was acquired by the entry of the land warrant and the location of the same upon the land in question. Whether such right was acquired or not, is purely a federal question, since it involves a right claimed or denied under an Act of Congress. Or, if the claim so made by William Long, (or his privy) shall be denied, then the said William Long (or his privy) further claims, that if any right was acquired by Robert Craig by reason of the entry of said bounty land warrant upon and the location of the land in controversy by it, that then that right was cut off and nullified by a decision made by the Land Department, under and pursuant to an Act of Congress authorizing the Department of the Interior to so cancel and set aside such entry. Whether the department had power or authority, under the Act of Congress, as claimed, to cancel or set aside that warrant, necessarily presents a federal question, for that the right so to do is claimed under an Act of Congress, and Robert Craig (or his privy) denies that the right so to do was duly exercised under the Act of Congress. The questions presented, therefore, by each party, are questions arising under Acts of Congress. The primary questions therefore presented in

the case turn upon, as well as, involve rights claimed by the respective parties under Acts of Congress.

If Robert Craig by the entry of the bounty land warrant upon the land in controversy, acquired any right or interest in or to the land, then he acquired such right under the Acts of Congress authorizing such entry or location. The fact that Robert Craig did make such entry is conceded by William Long, (or his privy) and constitutes the basic fact of the claim of William Long (or his privy) to have the entry or location set aside. If there was no entry of the land by Robert Craig, then there is no right of substitution in William Long, (or his privy) or any one else, and that right of substitution is what is here involved. William Long (or his privy) further claims that under a regulation made by the Land Department under and pursuant to the Acts of Congress creating and defining the powers of such Department, the entry or location by Robert Craig has been set aside; while Robert Craig (or his privy) claims that the Department had no right or authority under the Act of Congress to cancel or set aside the said bounty land warrant under the circumstances set forth in this case.

Again, if, under the Act of Congress, the department had authority by pursuing a particular course, such as giving notice and having the parties before it, to determine the question as to whether the assignment of the land warrant was or not a forgery, then it is incumbent upon William Long, (or his privy), to show that that power, so claimed to be exercised by the Department, under the Act of Congress, was exercised in the manner provided for by such Act of Congress.

And unless the department did exercise its powers in the manner pointed out by the Act of Congress, then the claim made by William Long (or his privy) for rights arising thereunder, cannot be maintained.

In the argument in support of the motion to dismiss, counsel seem to claim that the order made by the department determining that the assignment of the bounty land warrant was a forgery, is conclusive upon us, or rather that it compels us to take proceedings to set it aside. But it must be remembered that since the Act of Congress giving the power to the department to set aside the assignment as

a forgery, does not give such power without notice to the assignee and locator, that then in the absence of such notice the order setting aside is absolutely null and void. It is not simply a voidable order, but one which is absolutely void. And under the facts, as pleaded in this case, there is no order by the department canceling the warrant, because of the forgery in the assignment, since the department, under Act of Congress, had no authority so to do, without notice to the parties interested therein. It is wholly void and the same as if it did not exist at all or never had been made. There can be no acquiescence in such an order, because no notice of its existence ever came to Robert Craig (or his privy) and hence there could be no estopple. If the order setting aside the warrant or cancelling the warrant because of forgery in the assignment of it, is void, then no question arises nor can there be any dispute as to the rightfulness of the taxation of the land and its sale under the revenue laws of the state where the land is situated.

The counsel for the motion fail to take notice of the real basis of the controversy and affect to believe that the question is one upon the power of taxation, when the facts are conceded to be as they claim them. The question of taxation even under those facts, may present fairly a federal question. That is to say, whether under the laws of Congress or the constitution of the United States, the state would or not have a right to tax the land, under the facts as claimed by the plaintiff below. But the questions involved here lie bank of and arise anterior to the question of taxation. If the entry of the land under the bounty land warrant, was rightful and there has been no valid order setting it aside, then the plaintiff below has no right whatever, and the plaintiff in error is clearly entitled to the land. The entire of the questions, therefore, here presented and upon which the rights of the parties must rest, are questions arising upon the record anterior to the question of taxation. If there was no forgery or the order of the Pension office was void, then the land was taxable. If the land was properly entered under the bounty land warrant, then it was paid for by the warrant and the United States government had no interest in it, and the state had the right to tax it.

The counsel for the defendant in error, in their argu-

ment in support of their motion to dismiss the writ of error, after mistakenly affirming that whether the assignment was a forgery; whether any notice was necessary to a proper exercise of the authority by the Department to declare it a forgery; whether the order canceling the warrant had any effect or not, and whether any rights were effected by the failure to issue a patent, etc., are immaterial, proceed to make this very important concession, to-wit: "A proceeding contesting the authority of the land department to decide upon the validity of a bounty land warrant, or to set aside an order cancelling it, or to assert the right of a locator to a deed for the land upon surrender of the warrant, would draw on question the construction of the statutes of the United States conferring authority and regulating the manner of its exercise." (Arg. 6).

This is substantially the controversy now before the court. Robert Craig did not, nor did any of his privies in law, estate or blood, have any notice whatever of the proceeding before the department. That proceeding is first set up in this action which was brought twenty-eight years after the proceeding is claimed to have been had, and during twenty-one years of which time, Robert Craig's privies had been in possession of the land. Now this suit is brought setting up a right bottomed upon that unnotified and unknown order made by the Pension Department; and against that claim, thus tardily and untimely set up, the defendant shows that the order upon which the plaintiff asserts his claim, is absolutely void and the same as if no such order had ever been made, thereby directly "contesting the authority of the Land Department to decide upon the validity of a bounty land warrant * * * * and asserts the right of the locator to a" patent for the land. In other words, the contest is exactly what the counsel for the defendant in error in his argument concedes to be a federal question.

As to what is a federal question, and as abundantly establishing that there are federal questions involved in this case as well by reason of the denial of rights claimed under Acts of Congress as from the fact that the Pension office undertook to decide questions pursuant to a power claimed under an Act of Congress, but which power was not conferred to be exercised in the manner it was exercised, we cite the court to the following cases which are but a few

among very many decisions by this court substantially in accordance therewith.

Cohens vs. Virginia 6 Wheat 264.
Railroad Company vs. Mississippi 102 U. S. 133.
Starin vs. New York 115 U. S. 248.
Carson vs. Durham 121 U. S. 421.

The jurisdiction, if any, conferred by Act of Congress upon the Department of the Interior to determine the question as to whether an assignment of a land warrant was or not a forgery, is a jurisdiction constituting the Department a tribunal of special, limited, and statutory jurisdiction, and its judgments and orders, to entitle the same to any weight or consideration as evidence, must set out the facts showing its rightful exercise of the authority conferred, and without such showing its orders are not entitled to consideration nor are they competent evidence. Whatever presumption may be made in favor of the decision, when the right to decide is shown, there can be no presumption in aid of the right to decide. The order made by the Pension office, not showing any facts giving jurisdiction to make it, is void on its face. It is a nullity.

The plaintiff in error, therefore, asks that the motion to dismiss the writ of error be overruled.

ARGUMENT.

I.

The claim of the plaintiff below is barred by lapse of time; if not technically barred by statute, it is stale; it is furthermore speculative, without real merit and without any substantial equity.

This is a suit in equity, to enforce a right or interest acquired from Robert Craig. This suit was commenced in the State Court, on September 15th, 1892. Robert Craig entered the land in controversy May 19th, 1858, thirty-four years and a half before this suit was brought. After the land was entered by Robert Craig, he paid no attention to it in any way or manner; he never paid any taxes; he never was upon the land, and never asserted any right or title thereto.

The plaintiff below, William H. Durham, claims to have acquired the title to the land from Robert Craig by conveyance dated March 19, 1886—twenty-eight years after the

land was entered by Robert Craig, and near twenty years after it had been sold for taxes. The record does not disclose what Durham paid for Craig's interest. The circumstances fairly imply that the plaintiff below, finding that the occupant of the land claimed it under tax title, thought it profitable to invest a small sum as a basis for litigation.

The certificate of entry of the land by Robert Craig was recorded in the records of Carroll County. The entry or location was never set aside or in any manner questioned. Under the statute of Iowa (Code of Iowa, Section 797, Subdivision 7) the lands were subject to taxation after the first year following the entry. Under this statute the lands were taxed by Carroll County for the years 1860, 61, 62, and 64. The taxes were not paid and thereafter on October 5, 1868, the same were duly sold for taxes and the plaintiff in error is the owner of that title. The Treasurer's tax deed was dated December 19, 1871, and the plaintiff acquired the title by deed of date February ——, 1874 and at once entered into actual possession thereof; his actual possession having continued more than eighteen years and six months before the bringing of this suit, during all which time he has paid the taxes upon the land and put the same under good cultivation, converting it into a most desirable farm. The plaintiff in error had no notice whatever, either actual or constructive, of the entry made in the Pension Office by the Commissioner of Pensions setting aside the warrant because of an alleged forgery in the assignment thereof. The records of the Land Office proper in Washington did not, nor did the records of the Land Office for the District of Iowa where said land was situated, nor did the records of the county of Carroll show anything respecting the entry made in the Pension Office.

While it may be true, as matter of law, that the Statute of Limitations of a state does not bar the sovereignty of the United States of its rights; yet in this case and in a suit in equity like this, the plaintiff in the court below having full knowledge of the staleness of the claim he was buying and of the actual possession by the defendant below, may well be held to be barred of any rights because of the laches of himself and of those under whom he claims and because of the staleness of the claim which he purchases.

II.

The Pension Office being a tribunal of limited, special and statutory authority, must show upon the face of its orders, or adjudications its power to make any order it does make.

The plaintiff below in an amendment to his petition, made the averments as follows. (Rec. 41 "and plaintiff alleges that said assignment, purporting to be executed by the said William Long, was not in fact executed by him, but the same was false and forged, and thereupon in proper proceedings had before the department of the Interior of the United States of America, to-wit, on the 1st day of February, 1894, said warrant was cancelled, as shown by endorsement thereon as follows: "Pension Office, February 1, 1864 —this warrant has been this day cancelled and declared void as against the United States on account of forgery in the assignment thereof. WILLIAM HELMICK, for Comissioner."

The defendant below in his answer to said amendment denied each and every statement therein contained. (Rec. 11). There was no proof upon the subject, except the admission by the defendant below that such entry was made by the pension office. This condition of the pleadings, leaves the case of the plaintiff below, standing alone upon the force or effect which such an order, made without notice to anyone and without any proper proceedings had before the Department. We address ourselves now to the question as to the force and effect of such an order made without notice to anyone.

First. The entry of land in the United States Land Office by money, warrant or scrip, and the issuance by the Land Office to such locator of the certificate of entry by him of such land, vests such locator with an interest in the land so entered or located. Such interest thus acquired cannot be divested without some notice to the person having acquired the interest. This principle is fundamental and needs no citation of authority to support it.

Second. The statute conferring upon the Department of the Interior authority or jurisdiction to act in such matters, confers only a limited, special and statutory jurisdiction. The jurisdiction so conferred must be exercised in the manner pointed out by statute not only,

but the record of its action, under such jurisdiction, must show upon its face the existence of such facts as confer jurisdiction to make the order in question.

Third. In this case the plaintiff below averred that such order was made in proper proceedings had before the Department of the Interior; this averment is expressly denied and no proof whatever was offered to sustain it, except simply the order itself.

The rule that where a statute confers upon a tribunal of limited and statutory jurisdiction a special power, to be exercised under particular circumstances and in a particular manner, it is indispensible to the valid exercise of the power, that such circumstances exist at the time and that the court proceed in the exact manner prescribed. Sears v. Terry 26 Conn. 273. Even where a court of general jurisdiction has such special and statutory authority or jurisdiction conferred upon it, its decisions are regarded and treated like those of courts of limited and special jurisdiction and no presumption of jurisdiction attaches to its judgment therein. In such case the facts essential to the exercise of the special jurisdiction must appear upon the face of the record.

Harvey v. Tyler, 2 Wallace 342.

Galpin v. Page, 18 Wall, 350.

Pulaski County v. Stuart, 28 Gratt., 802.

The same statement of law is put in other forms, such as that it is well settled that a judgment in a summary proceeding must show upon its face everything that is necessary to sustain the jurisdiction of the court rendering it.

Crockett v. Parkison, 3 Coldw., 219.

1 Black on Judgments, 280.

Again: Courts of inferior or limited powers must not only act within the scope of their jurisdiction, but it must appear on the face of their proceedings that they so acted. The record or minutes or papers in the case must affirmatively show the existence of every fact necessary to give jurisdiction in the particular case—1 Black on Judgments, Sec. 282, and cases there cited. We need not cite further authorities upon the question as to the effect of the order made by the Department. We need not cite

authorities to show that the tribunal was one of limited special and statutory jurisdiction. There is no showing of the facts authorizing the Department to act in the particular case either by recital in the order itself or by proof *aliunde*. The right or power to act in the premises was denied, thereby casting the burden expressly, as well as by implication of law, upon the plaintiff, and not a word of testimony was offered thereon.

The entire claim and judicial standing of the plaintiff below, are bottomed, solely, upon the fact that the warrant was cancelled. If the assignment of the warrant was not forged in fact, nor has been found in proper proceedings, had to have been forged, then the plaintiff below has no standing in court and no right to any relief. This fact is the essential and material fact to give plaintiff any standing or right in court. We submit that such fact has not been shown, nor has the right to determine the question by the Department been at all vindicated. There is, therefore, no evidence whatever, to sustain this essential fact; the case of the plaintiff below must therefore fail and the judgment of the Supreme Court of Iowa must be reversed.

III.

The Department of the Interior possessed no power or authority to cancel a land warrant in any event, it being a judicial question whether the assignment was forged or not; the Department may not rightfully exercise such judicial power—even if it had the power or authority, it could not exercise it without notice to the adversary party and no such notice is shown in this case.

It is well settled, as we submit, that the Department of the Interior may not exercise judicial powers. While it may exercise power involving more or less of discretion or judgment, when it is clothed by statute with such authority.

Whether the determination of the question involving the fact of forgery or no forgery is a judicial question, cannot, we submit, be a matter of doubt. The determination of the question as to the fact of forgery, involves not only the rights of property, but it also involves the question of personal liberty; for, by the laws of all nations, forgery is a crime, a felony punishable at least with imprisonment in a

penetentiary. To determine such a question and whether or not a forgery has been committed, necessarily involves the hearing of testimony, the determination of legal questions and every other element necessarily in inhereing in a judicial question.

In Lindsay v. Hall, 2 Black., 554, the Supreme Court of the United States per Miller, Justice delivering the opinion, holds that the court will inquire into the facts respecting an entry and that it is not competent for the Department to adjudicate and determine the rights of parties in such cases. To the same effect is Stark v. Stark, 6 Wall, 402. In the late case of Cornelius v. Kessell, 128 U. S., 456, the Supreme Court of the U. S. expressly denied the right of the Department, in a case like the one at bar, to interfere or determine the rights of the parties. Where there has been an entry on land and payment therefor by warrant or otherwise, the right of the party becomes vested and such right can only be investigated in the courts of the land. The Supreme Court uses this language, (Page 761) "By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner, than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest, will be corrected whenever the matter is presented so that the judiciary can act upon it."

The Supreme Court of Iowa, in Arnold v. Grimes, 2 Iowa, 1, which was decided long before the case last quoted from, upon an exhaustive review upon principle and authority, hold that the Department of the Interior, or the Land Officers may not set aside an entry properly made in the Land Office. The same court in the case of the Heirs of Klein v. Argenbright, 26 Ia., 493, hold that the Commissioner of the General Office has no power to cancel the location of a land warrant when once made.

In Smith vs. Ewing, 23 Fed. Rep., 741, in an elaborate opinion by Judge Deady, (than whom we had have no more painstaking District Judge,) it was held ; "That a certificate of purchase issued in due form in favor of a pre-emptor, for land subject to entry under the pre-emption law, cannot be cancelled or set aside by the Land Department for alleged fraud in obtaining it; but in such case the government must

seek redress in the courts where the matter may be heard and determined according to the law applicable to the rights of individuals in like circumstances." Citing:

Moore vs. Robbins, 96 U. S. 530.

Perry vs. O'Hanlon, 11 Mo. 585.

Brill vs. Siles, 35 Ill. 309.

Cornelius vs. Kessell, 58 Wis. 241.

In the case of Glidden vs. Union Pac. Ry. Co., 30 Fed. Rep. 660, a case involving the effect of a decision of the Commissioner of the General Land Office cancelling an entry in the Land Office, Brewer, Justice, in his opinion determining the case in the circuit court of Nebraska, uses this language: "It is elemental that, to make a decision binding upon a party, he must have his day in court. This order of cancellation was made without notice to complainant, and was unknown to him until months thereafter; and it would be novel to hold a party bound by a decision of which he had no knowledge, and in a proceeding of which he had no notice, actual or constructive."

In this case it will be remembered that the Pension Office did not cancel either the entry or the certificate of purchase, but only canceled the warrant, leaving the entry and certificate in full force. As bearing upon this fact, we call the attention of the court to the Aurora Milling Co. vs. 85 Mining Co., 34 Fed. Rep. 615, where it is held that "an entry and certificate of purchase, so long as they remain uncanceled, are equivalent to a patent, so far as the rights of third parties are concerned." See also

Wilson vs. Fine, 40 Fed. Rep. 52.

It seems to counsel for plaintiff in error, that these cases leave no room for doubt that the order of the Department canceling the warrant was and is absolutely void and that the plaintiff below cannot make it the basis of any right or title whatever.

IV.

The entry of the land by Robert Craig and the issuance to him of the certificate of entry, gave to him such an interest in the land as that the same became subject to taxation by the state.

It will be remembered that Robert Craig entered the land in controversy on the 19th day of March, 1858, and upon the deposit or payment of his bounty land warrant, received the usual locator's certificate of entry, showing

that he had located, entered and paid for the land and that a patent would issue in due time. The lands were subjected to taxation for 1860, 1861, 1862 and 1864, and were sold for those taxes. These facts, therefore, make the foregoing proposition material and vital in the discussion of the case, if we are mistaken in our proposition that the order of the department canceling the warrant was void

We desire to call the attention of the court, first, to decisions made by the Supreme Court of the United States, bearing upon this question and then to some other cases in other states and in Iowa.

In Carroll vs. Safford, 3d Howard 441, this question was elaborately considered and the court held, as is correctly stated in the head note "by the law of Michigan, lands, for which patent certificates had issued, were liable to taxation, at their full value, as the property of the purchaser, though no patent had been issued, and such a law is valid under the constitution and laws of the United States."

The opinion was delivered by McLean J. who says, (460) "It is said, the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect, it is considered as belonging to the reality. Now, why cannot such property be taxed by its proper denomination as real estate? In the words of the statute, 'as lands owned by non-residents.' And if the name of the owner could not be ascertained, the tract was required to be described by its boundaries or any particular name. We can entertain no doubt that the construction given to this act by the authorities of Michigan, in regard to the taxation of land sold by the United States, whether patented or not, carried out the intention of the law making power."

In Witherspoon vs. Duncan, 4 Wall, 210, the court decided as is correctly stated in the head note, as follows: "Lands originally public, cease to be public, after they have been entered at the land office and a certificate of entry has

been obtained. Lands so entered are liable to taxation; and if the taxes remain unpaid, they may be sold like other lands, even though no patent may as yet have been issued."

In Starks vs. Starr, 6 Wall, 402, the court decided as follows: "The right to a patent once vested is equivalent, as respects the government dealing with the public lands, to a patent issued. When issued, the patent, so far as may be necessary to cut off intervening claimants, relates back to the inception of the right of the patentee." See also: Railroad Company vs. Prescott, 26 Wall, 603.

In McClung vs. Steen, 32 Fed. Rep., 373, a case decided by Justice Brewer, it is held, that, "On payment of the purchase price and issue of the receiver's final receipt, the full equitable title passes to the person who has entered the land, and this title he may convey by quit claim prior to obtaining the patent."

U. S. vs. Freyburg, 33 Fed. Rep., 150.

In Aurora Hill Milling Co. vs. 85 Mining Co., 34 Fed. Rep., 516, it is held that, "An entry and certificate of purchase, so long as they remain uncanceled, are equivalent to a patent, so far as the rights of third parties are concerned."

In Simon vs. Wagner, 101 U. S., 260, it is decided that, "A party in possession of lands, holding an uncanceled certificate of the register of the land office within whose district they are situated, showing that full payment was made for them, was sued in ejectment by the party who subsequently entered them, and obtained a patent therefor, held that the plaintiff is not entitled to recover." The same doctrine is announced in

Wirt vs. Branson, 98 U. S., 118.
Frisby vs. Whitney 9 Wall, 187.
Barney vs. Dolph, 97 U. S., 652.
Defenback vs. Hawke, 115 U. S., 302.

That it does not require a patent in order to render lands taxable in Iowa as against the holder of a certificate of entry or other right to a patent, is abundantly shown by the following cases:

The Iowa Homestead Co. vs. Webster Co., 21 Iowa 221.
The C. R. & M. R. Co. vs. Carroll Co., 51 Iowa, 153.
See also Smith vs. Custer, Copp's Land Laws 789–797, before Secretary of the Interior.

V.

The fact, if it be such, that the bounty land warrant upon which the entry was made, was cancelled, whereby Robert Craig became liable to lose the land unless he supplied another warrant or paid the entry price in money, would not defeat this right of taxation by the state, any more than if some natural person held the technical legal title. The right to tax the interest of Robert Craig in the land, which was his equitable title or right therein resulted to the state, without the power to prejudice by such taxation, the technical legal title held by the government.

It will be remembered that under all the authorities, respecting which there is no conflict, the title acquired by the locator and holder of the certificate of entry, is an equitable title, which the holder may sell, assign or convey. It is this equitable right and interest of the locator and holder of the certificate of entry, which is by the state subjected to taxation. See:

Barney vs. Dolph, 97 U. S., 652.

U. S. vs. Freyburg, 32 Fed. Rep., 195, and cases there cited.

Simons vs. Wagner, 101 U. S. Rep. 260.

Witherspoon vs. Duncan, 4 Wall, 210.

It is not the technical legal title which is subject to taxation, but the equitable title which has accrued to the locator under the payment he has made and the issuance to him of a certificate of entry. While he enjoys the equitable ownership, with the right to occupy and use the land thus entered, the statute makes him liable for the taxes upon the land.

It is held by all the cases, without exception, that when one enters land and obtains his certificate of location or entry, he has acquired an equity in that land, which he may sell and dispose of by assignment, by quit claim deed or otherwise. Now if he has such a property as that he could sell it and receive the consideration for it, why should he not be taxed upon that equity.

VI.

A taxation by the state, of lands which have been entered regular in form and for which certificates of entry have been issued to the purchaser from the government, is always in every case subject to the paramount right of the government to assert any right which it may have in the land so entered, by reason of the existence of any just or equitable basis for the assertion of the right.

So that the taxation by the state is always, though absolute when made, subject to the rights of the government; but the interest of the purchaser holding the certificate of entry is that which is taxed and the right to enforce the taxation against such interest cannot be defeated by showing some interest in the government at the time the taxes are levied.

In Stockdale vs. the Treasurer of Webster County, 12th Iowa, 536, the court held, as correctly stated in the head note as follows: "The legal title is not essential to constitute a taxable interest in real estate; the lands held by the United States in trust for grantees are subject to taxation as the property of such grantees." In the course of the unanimous opinion of the court, Wright, J., uses the following language: "It is admitted that the property is liable to taxation if the title was out of the United States. If by this, it is meant that the full legal title must be in some other person than the government, before the land could be taxed, the position would not be tenable. The complainant would have a taxable interest, so to speak without having a legal title."

VII.

The regular taxation by the state and the sale of the land under such taxation and the execution of the deed in conformity with the law, followed by the continued adverse possession by the plaintiff in error and his grantors constitute such a title in the plaintiff in error and holder of the deed as called into operation the statute of limitations. See:

Wheeler vs. Merriam, 30, Minn. 372.

County of Case vs. Morrison, 28 Minn., 257.

McClung vs. Stein, 32 Feb., Rep., 273.

U. S. vs. Freyburg, 32 Fed. Rep., 195.

Coleman vs. Pestigo Lumber Co., 30 Fed. Rep., 317.

This proposition, together with the authorities cited, sufficiently explains itself without further argument.

VIII.

The statute of limitations, being called into operation, would run against Robert Craig and all persons claiming under him, including the defendant in error, although no patent was issued to him, because Robert Craig or his grantees could have brought suit in Iowa to establish his rights at any time after the execution of the tax deed.

He did not need to be the owner of the legal title, in

order to bring such suit under our law. Indeed this is not a suit at law, but a suit in equity and could just as well and effectively have been brought in 1871, immediately after the delivery of the tax deed, as when it was brought. The delay of Robert Craig or his grantees to bring the suit, cannot extend the period of the statute of limitations. It is a well settled rule and maxim that a party by his own act may not extend or defeat the statute.

Hintrager vs. Hennessey, 46 Iowa, 600.

Atking vs. Paige, 5ff Iowa, 666.

Darue vs. King, 74 Iowa, 288.

The claim that the statute of limitations does not run, because the title to the land in controversy was in the government, is not sound. The doctrine is for the protection of the government alone and does not apply between private parties.

It was held in the United States vs. Beebe, 127 U. S., 338, as follows: "The United States are not bound by any statute of limitations nor barred by laches of their officers in a suit brought by them, as sovereign, to enforce a public interest; but where they are formal parties to a suit and the real remedy sought in their name is the enforcement of a private right for the benefit of a private party and no interest of the United States is involved, a court of equity will not be restrained from administering the equities between the real parties, by the exemption of the government, designed for the protection of the United States alone."

IX.

The tax deed and the statute of limitations, operate to toll and bar whatever right, legal or equitable, Robert Craig or his grantees had at the time of the delivery of the deed.

Code, Section 902.

Code, Section 2529, sub-division 5.

United States vs. Beebe, 127 U. S., 338.

In conclusion, we confidently submit that the plaintiff in error, Hussman's, right to make substitution and hold the land in controversy is recognized and established by all the authorities. That the claimed contradition of authorities, is but seeming, and that a careful examination of each of the cases will show a harmony of the decisions in accord

with contention. We ask that the judgment of the court below be reversed and the right of the plaintiff in error, Hussman, to the land in controversy be established and quieted, as well his right of substitution.

A reversal is respectfully asked.

C. C. COLE,
Att'y. for Plff. in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, A. D., 1896.

No. 64. 66-

BERNHARD HUSSMAN, Plaintiff in Error,

vs.

WILLIAM H. DURHAM, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF IOWA.

ARGUMENT FOR DEFENDENT IN ERROR IN REPLY

TO

ARGUMENT FOR PLAINTIFF IN ERROR ON THE MERITS AND IN RESISTANCE TO DEFENDANT'S MOTION TO DISMISS.

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In the discussion of the motion to dismiss, the plaintiff in error admits the first of the five numbered facts which the motion to dismiss is based upon, but denies each of the other four. The facts stated in the motion numbered two and three should have been reversed in the order of statement and numbering, and with that change made the facts as stated are correct.

Tho only errors claimed in the statement are:

1st. That the officers of the land office refused to ac-

cept said *warrant in payment for said land*, which was corrected by saying, the truth is the land officers did accept the warrant and issue the certificate of entry to Robert Craig.

2d. That in the third claimed fact it is stated that after the cancellation of the warrant the land was placed on the tax list in 1860. The alleged inaccuracies in the fourth and fifth statement of facts are not pointed out.

The statement made to correct the first of the alleged errors, to-wit: "That the land officers did accept the warrant and issued the certificate to Robert Craig," is made in the first five numbered facts upon which the motion to dismiss is based. While it is true as stated, that the warrant was received at the local land office for the purpose of entering the lands described in the certificate, it is also true as stated that the officers of the general land office refused to accept it in payment for the land, cancelled it and withheld the patent, until substitution of a valid warrant or money should be made for it.

It is stated in the third that the lands were listed for taxation and taxed for the years 1860, 1861, 1862 and 1864. The time when this was done is fixed in the statement of the fact by the use of the word "thereafter", with which the statement commences and which by a mistake in the numbering refers to the date of the cancellation of the warrant, instead of the date of the certificate of location.

ARGUMENT.

The claim made by the plaintiff in error in different forms is in substance, that the entry of the land by Robert Craig as the holder of the land warrant issned to Wm Long created an interest in the land in Robert Craig which made it liable to assessment and the levy of taxes under the laws of Iowa; that he is the owner of the lands under a conveyance made

by the Treasurer of the county in which they are situated, upon a sale of them for delinquent taxes, and that he is entitled as such owner, to make substitution in money for the cancelled warrant upon which the location was made, and obtain a patent therefor.

The statement preceding the argument for plaintiff in error is not correct, either as to the controversies in this action, or the parties to it. This is not "a controversy between Robert Craig (or his privy), a holder and locator of a bounty land warrant issued under act of congress and Wm. Long (or his privy)." Wm. Long is not a party to the controversy; is in no wise affected by it; has no interest in it. Long did not locate the warrant and has no privy. Whether the assignment of Wm. Long was genuine or forged, he has no interest in the land, or in this controversy. If genuine Robert Craig having as the holder entered the land under the warrant was entitled to a patent. If it was a forgery Wm. Long was entitled to have it reissued and to locate it upon any lands subject to entry.

The plaintiff below did not claim "That the right or title acquired by Robert Craig was set aside and cancelled." The certificate of location creates no right or title in the land. He could only acquire title by procuring the issue of a patent. He could only obtain a right to a patent, an equitable title to the land, by paying for it.

Wm. Long (or his privy) does not "claim that no right in or to the land was acquired by the entry of the land warrant and the location of the same upon the land in question." He makes no claim in reference to it. He, or his assigner, has probably long ago located the warrant, surrendered it and received a patent for the land located with it. At least there is no reason shown in the record why this should not have been done.

Wm. Long does not in any contingency, further the claim,

"That if any right was acquired by Robert Craig by reason of the entry of the said bounty land warrant upon the location of the land in controversy by it, that then that right was cut off and nullified by a decision made by the land department." The only right that Robert Craig acquired by the certificate of location was to surrender the warrant upon which it was made, and receive a patent for the lands, and the decision of the land department did not nullify or cut off that right. What it decided was that he could not surrender it then because he did not own it That the assignment under which he held it was forged. But all the right he acquired under the certificate remained, notwithstanding that decision. He could either procure the assignment of Wm. Long on that warrant, procure another warrant for the same amount or substitute money for the warrant and entitle himself under the entry, to a patent. The patent was refused for the alleged reason that he had no right to surrender it. Whether the officers of the land department had a right to determine whether the assignment was forged, either with or without notice so as to conclude the locator, is not material The record does not disclose how it was done, upon what proceedings or upon what notice, if any. It may have been in the presence and with the consent of the locator. It may have been under proper notice and proceedings if any were necessary. Or it may have been done without the locator's knowledge or consent, or without authority, and the locator might have had it set aside and by proper proceedings asserted the genuineness of the assignment, and compelled the issuance of a patent. Or he might have acquiesced in it, and made application to substitute money for it, which he finally did. The department upon his application issued a patent to him and delivered it to a trustee to be held until the rights of adverse claimants should be determined by a court of competent jurisdiction.

Until the government accepted the substituted money and issued a patent, it held both the legal and equitable title,

and this without regard to the question as to the right of the officers of the land department to conclude the locator by a decision that the assignment under which he claimed the warrant was forged.

It cannot be said with reference to a contract of sale of lands by the United States, that if the officers who represent it shall refuse to receive in payment for it money which they believe to be counterfeit, or a warrant which they believe to be forged, that either the legal or the equitable title has passed thereby. The legal title does not pass from the government until the patent has been delivered. The equitable title does not pass until payment has been made and accepted. If the patent was withheld by reason of a controversy as to the genuineness of the warrant, neither the legal nor the equitable right to the land passed to the locator.

The question upon the facts in this case is whether the lands were taxable until the 24th day of June, 1888, when substitution in money was made in the name of Robert Craig.

The question is not whether the state of Iowa could have enacted laws subjecting the land or any interest in it under the circumstances to taxation, but whether the statutes or laws of Iowa under the stipulated facts made the lands or any interest in them subject to taxation. If they were taxable under the provisions of the laws of the state, a question as to whether such laws were in conflict with the laws of the United States, would be raised; and that question would be a federal question, but it is held by the Supreme Court of Iowa that under the laws of the state, lands of the general government are not taxable. That while lands may be taxed before the patent therefor has been issued, it can only be when the equitable title has passed from the general government and the person who has acquired the lands has a complete right to the patent.

Code of Iowa, Section 797.

Dickinson vs. Yetzer, 53d Iowa, 681.

Arnolds vs. County of Plymouth, 55th Iowa, 92.

Bronson vs. Keokuk, 3d Dill, 490.

Pitt vs. Clay, 22d Fed. Rep., 635.

Reynolds vs. the County of Plymouth, 55th Iowa, 90.

II.

It is claimed that if the department did have power under the act of congress to determine the question "it is encumbent on Wm. Long (or his privy) to show that it was exercised in the manner provided in the act of congress authorizing it and unless the department did exercise its power in the manner pointed out by the act of congress, then the claim made by Wm. Long (or his privy) for rights arising thereunder cannot be maintained."

It is not encumbent on Wm. Long (or his privy) to show anything. He has not and never has had or claimed any interest in the lands. Whether the assigment was genuine or a forgery, or what the department did with the entry whether it set it, or the warrant aside or issued a patent on it to Robert Craig, could in no manner affect him. If the order was void and of no effect, so as to conclude Robert Craig, he might have compelled by the institution of proper proceedings the issuance of a patent, notwithstanding the order, but he was not compelled to. He could, if he desired, acquiesce in the order and make substitution in money, which he has done. It could not be said that the United States had received payment for the land while its officers had refused to issue the patent for the alleged reason that the assignment to the latter was forged. If the locator had undertaken to compel a pat-

ent, he would have had to allege and prove a valid assignment of a warrant.

We submit that the question is whether under the laws of Iowa the land was subject to taxation, and that this is not a federal question.

III.

The first proposition in the argument for plaintiff in error is that the action is barred by the lapse of time, if not by the statute of limitation. That it is speculative and without real merit. Neither of these is a federal question. There was no occasion for bringing an action, and no cause for bringing the present action, until the patent was issued and placed in the hands of the trustee. The right of Craig to make substitution continued until the government had sold or disposed of the lands. No statute ran against the right to make substitution secured by the rules of the department and no right in the land could pass to him until he did. He did not claim any interest in the land until the 26th day of June, 1888. The necessity for a suit grew out of the action of the department when it received the money substitution for the warrant and issued a patent to Robert Craig, which was delivered to a trustee to be held until the rights of the adverse claims should be judicially determined in an action in a court of competent jurisdiction.

IV.

The second proposition discussed is that the pension office being a tribunal of limited, special and statutory authority must show upon the face of its orders or adjudications, its power to make any order it does make. The right and neces-

sity for the commissioner of the land office to decide upon the genuineness of the assignment of the warrant and to refuse to accept it in payment of the land and issue a patent therefor, is expressly declared in the case of *Cornelius vs. Kessler*, 128th United States, 456. The conclusiveness of such a finding need not be discussed. It has never been questioned in this case, and the only parties to this action who could have controverted it have accepted it as final and acted upon it; Robert Craig was content with it, and plaintiff in error relying upon the validity of his tax titles and claiming to be in privity with Craig applied to the land department to be allowed to substitute money for it.

It is said in the argument that the entire claim and judicial standing of the plaintiff below are bottomed solely upon the fact that the warrant was cancelled. This is a mistake. It is based upon the fact that until 1888 the government owned both the legal and equitable title. That the land had not been paid for until the money offered as a substitute for the warrant had been accepted, and the patent issued. Whether in point of fact the warrant was forged or not, is wholly immaterial. Both the locater and the government so treated it. If there had been no order of cancellation made and no endorsement of cancellation on the warrant; if the record only showed that acceptance of the warrant and issuing of the patent were refused because the assignment of the warrant was forged, no right or equity in the land such as would make it subject to taxation attached to the locator.

The authorities cited in the discussion of the third proposition of the argument do not sustain it. The right of the department to determine the right of the locator to surrender the warrant in payment for the land is maintained by them. This right does not cease until the patent has issued or payment has been accepted.

In the case of *Lindsey vs. Hawks*, 2d Black, 554, re-

ferred to, it was held that the action of the officers of the land office was not conclusive upon their rights, and that a court of equity might inquire into the proceedings and afford relief, if proper cause for it was shown to exist. The case of *Stark vs. Stark*, 6th Wallace, 403, holds that the right to a patent once vested is equivalent as respects the government dealings with the public lands to a patent issued. In the case of *Cornelius vs. Kessel*, 128th United States, 456, in which it is said in the argument for the plaintiff in error "the Supreme court of the United States expressly denied the right of the department in a case like the one at bar, to interfere with or determine the rights of the parties," it is said "when an entry is made upon public lands, subject to entry, and the purchase money for it is paid, the United States then holds the legal title for the benefit of the purchaser, and is bound on proper application to issue him a patent therefor." In the same case it is held, "The power of supervision possessed by the commissioner of a general land office over the acts of the register and receiver of the local land office in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land office." If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. * * * It cannot be exercised so as to deprive any person of land lawfully entered and paid for."

In the case of *Smith vs. Ewing*, 23d Fed. Rep., 741, referred to, all that the preemptor had to do was done. The land was paid for. The equitable title of the preemptor was completed. There is nothing in the authorities to prevent

the officers of the land department for the purpose of its own action to decide upon the genuineness of a warrant. It may refuse to issue a patent upon an entry made upon a forged warrant or forged assignment of a warrant. A person who has made an entry upon an assignment of a warrant which was not in fact made, but which was forged, could not base an action upon the mere fact of entry, without payment in some way, to set aside the action of the officer refusing a patent.

V.

The fourth proposition in the argument is that the entry gave to Robert Craig such an interest in the land as that the same became subject to taxation by the state. This proposition is not sustained, but is in direct conflict with the adjudged cases. The case of *Bronson vs. Keokuk*, 3 Dillon 490 is is in every material respect analogous to the facts in this case. The plaintiff located a land warrant in 1853. In May, 1862, it was cancelled because issued on false and forged papers Nine years afterwards the plaintiff substituted another warrant and procured a patent to be issued In the meantime the land had been assessed for taxation, taxes levied upon it, and becoming delinquent, the land was sold to pay them. Defendant was a purchaser and held a tax deed under the sale. The precise question in this case was decided. The court says: "Until a patent issued the legal title remained in the United States, yet after the right to a patent is completed and the equity is fully vested in a party, without anything more to be paid or any act to be done going to the foundation of his right, the land may be taxed, though no patent therefor has emanated." It was held that the location of the first warrant did not give complete equity to the land. That

the government was equitably as well as legally the owner of the land, and that in this condition the land was not subject to taxation.

In the case of *Pitts vs. Clay*, 25th Fed. Rep. 635, the same doctrine is maintained. In that case the bounty land warrant was located upon the premises in dispute, and a certificate of location issued. The commissioner of the pensions addressed a notice to the commissioner of the general land office requesting that the issuance of patent be withheld on the ground that the assignment of the warrant was a forgery. After the lapse of some years the applicant furnished a new warrant, which was substituted for the one he formerly held and a patent was issued to him thereon. Held, that during the period which lapsed between the filing of the original and the filing of the substituted warrant, the United States had such an interest in the land as prohibited taxation under the laws of the state, and the tax deeds based upon assessments during that period were void It is said, "If the United States had such an interest in it as prohibited taxation under the laws of the state, it follows that the tax deeds are wholly void." Citing *Railway Co vs. Prescott*, 16 Wallace, 603, wherein it is held "that the rule that the land may be taxed before conveyance of the legal title by the United States is only applicable to cases when the right to the patent is completed, the equitable title fully vested without anything more to be paid, or any act to be done going to the foundation of the right. In fact the equitable title in Williams was not perfected until the substituted warrant was furnished. Until this was done it was wholly uncertain whether Williams would ever pay for the land, and until a warrant was substituted or the money was paid it cannot be said that Williams had perfected an equitable title to the land; until the substituted warrant was furnished the payment for the land was not made, and until payment was made the United States had an interest in the land which prevented the state from

taxing the same, and hence tax deeds, being founded on taxes assessed prior to the substitution, must be held to be invalid and void." In the case of *Reynolds Co. vs. The Co. of Plymouth*, 55th Iowa, 90, the court says: "Really it cannot be claimed that the forged script would support any claim to the lands, the government, through favor, not because the locator held an equity to the land, reinstated the location and permitted genuine script or money to be substituted for the forged script and thereupon issued a patent for the land. Until this patent issued, plaintiff's intestate held neither title, nor equity in the land and it was not taxable by the state." The laws of Iowa do not tax an interest in lands or equity in them. The land itself is taxed and taxes are to be levied upon the assessed value of the lands. There is no provision made for assessing or taxing any equitable right, or interest in lands. The treasurer's deed under the sale conveys to the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed and also all the right, title, interest and claim of the state and county thereto." Code, Sec. 796-797. The cases referred to in the discussion of the proposition do not sustain the right of the state to tax land that has not been patented unless it has been fully paid for. It is then taxable upon the theory that the government holds the legal title only as trustee, for the person who is entitled to a patent for it, not for one who has some right or equity in it, but for one entitled to the land itself, the full legal title.

VI.

The fifth proposition discussed is: "The fact, if it be such, that the bounty land warrant upon which the entry was made was cancelled, whereby Robert Craig became liable to lose

the land unless he was supplied with another warrant or paid the entry price in money, would not defeat this right of taxation by the state any more than if some natural person held the technical legal right. The right to tax the interest of Robert Craig in the land, which was his equitable title or right therein resulted to the state, without the power to prejudice by such taxation the technical, legal title held by the government."

It cannot be properly said that Robert Craig became liable to lose the land, unless he had it to lose. If the bounty land warrant was cancelled, he had not, and could not acquire any right, legal or equitable, in it without some further action upon his part. Any other person had precisely the same right that Robert Craig had to acquire that land by paying for it, with a land warrant or cash. The only difference between him and another was that under the rule of the land department he might furnish a valid warrant or pay in cash, but until he did so he had no equity in the land. He had no right by contract. The government was under no obligation to convey. It still held both the legal and equitable title.

VII.

The sixth proposition is as follows: "A taxation by the state, of lands which have never been entered regular in form and for which certificates of entry have been issued to the purchaser from the government, is always in every case subject to the paramount right of the government to assert any right which it may have in the land so entered, by reason of the existence of any just or equitable basis for the assertion of the right." And to sustain it, it is said: "So that the taxation by the state is always, though absolute when made, subject to the rights of the government; but the interest of

the purchaser holding the certificate of entry is that which is taxed, and the right to enforce the taxation against such interest cannot be defeated by showing some interest in the government at the time the taxes are levied." The error in this proposition is in the assumption that the land is subject to taxation while the government retains the equitable title, and while it has a paramount right in it, and that any interest of a purchaser other or less than the ownership of the land can be taxed by the state While the government retains the legal title and the equitable interest in the land, it is not subject to taxation in any manner or to any extent. To say that the right of the government to its own land is paramount to the right of the state to tax assumes erroneously that the lands are subject to taxation at all, when the decisions, including Iowa decisions referred to, are to the effect that they cannot be taxed. "That taxation is prohibited" and the case referred to is in harmony with all the cases cited. It holds that lands held by the United States as trustee are not taxable.

VIII.

The error of the seventh proposition is in the assumption that there can be a regular "taxation by the state and an authorized sale of the land" before the equitable title of the United States is divested.

It is claimed in the eighth proposition discussed that the statute of limitations was called into operation because Robert Craig or his grantee could have brought suit in Iowa to establish his right at that time after the execution of the tax deed. This claim is erroneous. Robert Craig had no right or interest in the land whatever which would enable

him to bring any action in the state of Iowa, to establish any right. The only right he had, or claimed, was the right to make substitution of a valid warrant or money for the cancelled warrant. That he could do without suit, in the land department. There was no basis for any suit against the plaintiff in error until after substitution for the cancelled warrant was made, until which time the equitable title, as well as the legal, remained in the government.

Rule 41, adopted by the land department, confers a privilege upon the locator when a valid entry is withheld from patent on account of the objectionable character of the warrant, it does not create a right in him. After the cancellation of the warrant Craig was under no contract or obligation, express or implied, to furnish either a valid warrant or cash for entry. *Reynolds vs. The County of Brooklyn, supra.*

If the option to pay for the land entered with a warrant or in cash could be taxed under the state law it could be taxed only upon its assessed value. The value of such an option would not be the value of the land entered. Another selection of equal value might be paid for with the same money. That at most its value would be the expense of making another entry. The tax deed shows that the taxes for which the land was sold were levied on the assessed value of the land itself, and not upon the value of the privilege of paying for it by cash or warrant.

IX.

There was no privity between Craig and the defendant. In the case of *Bronson vs. Keokuk, supra*, it is said "The plaintiff (who made the original entry upon a warrant which was set aside because it was forged, and who subsequently substituted another warrant) has no transaction with the tax

title purchaser, or with the defendant claiming under the tax title purchaser. He has made no represetations to either of them and they have no covenants of his, nor is there any guarantee of warranty by him, so that his title acquired by the location of the second warrant and the patent will insure to him. A purchaser at tax sales buys upon his own suggestion, and at his own risk as to the title he obtains, and consequently an after acquired title does not inure to his benefit."

X.

It is admitted and averred in the answer of the plaintiff in error in the action below that Wm. Long, to whom said land warrant was issued, assigned the same in blank, and that he delivered it in blank. That the person to whom the same was delivered lost it. The finder sold said warrant to Robert Craig, who had no notice of such loss or finding, and who paid the full value therefor and in good faith filled his own name in the blank left in the assignment.

Under the code rules of the pleadings of Iowa, this answer is considered as denied without further pleading, and no proof was introduced in support of its allegations. But if the facts are as therein stated, the assignment was not complete for the want of the name of an assignee when it was delivered, and it was not completed by filling the blank, either by the person to whom it was delivered or any person authorized by him. There is no allegation, and no showing, that any authority was given to the person to whom it was delivered, or to any other, to complete the assignment. The finder acquired no title thereby. He could not bind the owner by a sale of it. He had no authority to fill, or authorize the filling of the blank assignment. If it be assumed that the person to whom the warrant was delivered in blank had purchased it, and that he had authority as such owner to

transfer it to Craig, and that Craig might upon such transfer fill up the blank by inserting his own name, it does not follow that the person who did not own it, who had no right to it except as a finder, could confer any such right and authority. However innocent Craig may have been, he acquired no right in the warrant, simply because the person who delivered it to him had no right or interest in it and could confer no such right, and had no authority to bind the owner. While there are authorities that hold that a deed blank as to the grantee may be filled up by the grantee himself, if authorized by parol, there are no authorities that we have been able to find authorizing the finder of lost deeds to fill out the blanks, or by delivery thereof to another, confer upon him the right to fill up blanks. See 5th American and English Encyclopedia of Law, page 424, and cases cited.

Many cases hold that a deed executed and delivered with the necessary part left in blank is ineffectual as a conveyance though afterwards the blank is filled, but other cases hold that if the filling of a blank is by express authorization of the grantor, this is sufficient, even though the authority is by parol.

Rights, Remedies and Practice, Lawson, vol. 5, p. 3802.

If this wholly imaginary state of facts is taken as true, it was obviously the duty of the officers of the land department to refuse to receive it in payment of the land. And the equitable title to the land remained in the United States, notwithstanding the entry and certificate of location issued thereunder.

Bancroft & McCaugh
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C. C. Wois